HB 83/16
HC 884/15
X REF HC 885/15 & HC 1153/15

PROFERT ZIMBABWE (PVT) LTD

Versus

MACDOM INVESTMENTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 4 & 17 MARCH 2016

Opposed Application – Winding-Up

Advocate A. P. de Bourbon SC, for the applicant
Advocate T. Mpofu, for the respondent

MAKONESE J: This is an opposed application for the compulsory winding up of the respondent on the basis that it is commercially insolvent and unable to pay its debts. The application is brought in terms of the provisions of section 206 (f) of the Companies Act (Chapter 24:03). Applicant contends that on the basis of the papers filed, it has been established that the applicant is entitled to an order for the liquidation of the respondent, and an order to that effect is sought. The respondent argues that this application is nothing but a debt collection tool disguised as an application for compulsory liquidation. It is contended by the respondent that the application is an abuse of court process, regard being had to the fact that the debt sought to be enforced is disputed on bona fide grounds.

The respondent raised three main points *in limine*, but before I deal with these preliminary issues I propose to set out the brief factual background to this dispute.

Background

The Agricultural Rural Development Authority (ARDA), a body corporate, plans, promotes, co-ordinates and carries out services for the development, exploitation, utilization, settlement or dispersion of state land. The respondent concluded a written Build, Operate and Transfer Agreement (BOT) with ARDA for a period of 20 years, commencing 1 March 2009. In terms of this agreement respondent had to crop, build and develop upon land made available by

ARDA at Chisumbanje. Respondent was required to cultivate crops, more specifically sugar-cane. Such sugar-cane was in due course produced for the production of ethanol. A close relationship exists between the respondent and a company known as Green Fuel (Pty) Ltd which operates a large factory/plant on the Chisumbanje Estates manufacturing bio-ethanol from sugar-cane. Such bio-ethanol is a source of high quality, high octane, clean efficient renewable energy used as a vehicle fuel on its own, blended with petrol (up to 20%), or used as petrol octane enhancer. The Zimbabwe Government has awarded the Green Fuel venture national Project Status in view of the long term energy solution which it provides. The respondent by necessity requires agricultural inputs for the production of sugar-cane. It is against this background that the applicant became involved in the sale and delivery of substantial quantities of fertilizer products to the respondent. During the year 2009 through to 2010, respondent purchased certain quantities of fertilizer from a company known as Brocline Investment (Pty) Ltd, trading as Nutrichem. In due course, the name of this company was formally changed to "Profert – Zimbabwe (Pvt) Ltd. This application has been instituted by Profert (Zimbabwe) (Pvt) Ltd and essentially deals with the non-payment of fertilizer delivered to the respondent.

Applicant has two claims for payment against the respondent. The first claim relates to what is termed the "Legacy Debt". This amount refers to amounts dating before 28 November 2013 and allegedly acknowledged in writing by the respondent. The amount being claimed in the first instance is US$567 879,80. The second claim refers to amounts in terms of a Memorandum of Agreement executed on 28 November 2013. The figure claimed by applicant is US$682 221,81. Both amounts have been disputed by the respondents who allege that the applicant grossly inflated the prices of the fertilizer products. The respondents contend that as soon as the correct prices have been quantified sufficient guarantees have been put in place to liquidate the debt.

The basis of the applicant's claims

From about 2014 the dispute between the parties dragged on without an end in sight. A considerable volume of e-mail communications was exchanged between the parties. As usual

there were allegations and counter-allegations but the debt remained unpaid. On 10th October 2014 the applicant's legal practitioners addressed the following letter to the respondents:-

"10 October 2014

The Directors
Macdom Investments (Pvt) Ltd
54 Edinburg Road
Vainona
Harare

To be served by the Sheriff

Re: PROFERT ZIMBABWE (PVT) LTD

1. We are instructed to direct the notices set out hereunder on behalf of our said client, Profert Zimbabwe (Pvt) Ltd ("Profert")
2. We are instructed that Macdom Investments (Pvt) Ltd ("Macdom") is indebted to Profert as follows:
   2.1 Fertilizer products sold and delivered at your special instance and request for the period prior to 28 November 2013 ("the legacy debt") and
   2.2 Written memorandum of agreement dated 28 November 2013 ("the MOA") read together with a written amendment dated 14 February 2014, in respect of additional credit in addition to the legacy debt.
3. The legacy debt already due and payable at the conclusion of the MOA was duly recorded and acknowledged by Macdom in the MOA to wit US$545 698,62.
4. Limited payments have been made in respect of the said legacy debt with the amount presently due and payable being US$567 879,80 as set out in Annexure "A" hereto
5. The amount presently due and payable in respect of the MOA is US$682 221,82, as set out in Annexure "B" hereto.
6. Demand in terms of the Companies Act:
   6.1 Profert in terms of section 205 (a) of the Companies Act (Chapter 24:03) ("The Companies Act"), hereby requires of Macdom to pay the said amounts of US$567 879,80 and US$682 221,82, respectively, already due and payable.
   6.2 This demand shall be served and a copy left by the Sheriff at the registered office of Macdom.
   6.3 Should Macdom neglect to pay the said amounts for a period of three week after receipt of this notice, Macdom shall be deemed to be unable to pay its debts.
   6.4 In such event Macdom may be wound up by the court as it is unable to pay its debts, in terms of section 206 (f) of the Companies Act.
   6.5 We hold instructions accordingly.
7. Notice in respect of release Orders

7.1 In terms of the MOA and in order to secure payment for the fertilizer provided to Macdom, Green Fuel (Pvt) Ltd ("GF") has executed Release Orders in favour of Profert or its duly nominated agent for anhydrous ethanol fuel.

7.2 It was agreed in the MOA that in the event that Macdom fails to pay Profert for fertilizer supplied in terms of the MOA, Profert shall be entitled, upon giving 10 days written notice to GF and Macdom to use the Release Orders so that Profert may be able to recover the outstanding purchase price.

7.3 GF has executed the following replacement Release Orders in terms of the MOA

7.3.1 Release Order GF 000635 dated 30 June 2014: 39600 litres;

7.3.2 Release Order GF 000697 dated 11 July 2014: 536800 litres and

7.3.3 Total 932800 litres

7.4 Macdom is in addition to the demand and remedy set out in paragraph 6, hereby notified that should payment not be made within 10 days of receipt hereof, Profert shall through its nominated agent, RAM Petroleum, have the said fuel released and liquidated.

7.5 Any such proceeds shall be credited to the amounts due and payable, as set out above.

7.6 Any balance then owing shall remain due and payable in terms of the demand in paragraph 6.

7.7 This notice shall also be served on GF and the Msasa Depot in Harare of the National Oil Infrastructural Company.

8. Your speedy response would be appreciated.

Yours faithfully

MATIZANADZO & WARHURST"

On 3 November 2014, the respondent's legal practitioners responded to the demands and threats to apply for compulsory liquidation by indicating as follows:-

> "… As previously advised in our letter dated 5th September 2014 our clients took issue to your client's irregular pricing and your client duly obliged and agreed to the adjustment of same. The reconciliation that your client had agreed to undertake from inception of supply to date was never done and hence our clients still dispute your client's invoices. The fact that your client has failed and or refused to undertake the reconciliation has compounded our client's suspicion of pricing irregularities.
>
> Our clients are accordingly not failing to pay your client's supposed debt but rather disputing the quantum due to your client.

> In the light of the above, your client is thus misguided in seeking to apply for liquidation of Macdom Investments (Pvt) Ltd and Rating Investments (Pvt) Ltd in terms of section 205 of the Companies Act (Chapter 24:03) given that our clients cannot be "deemed unable to pay its debts." In any event our clients are not insolvent…"

On 7 April 2015, the application for the winding up of the respondent in terms of section 206 (f) of the Companies Act was duly filed. The application is opposed on the broad grounds outlined in the letter by respondent's legal practitioners. I now proceed to deal with the points *in limine* that have been raised by the respondent.

Preliminary Points

In oral argument, Mr *T. Mpofu* for the respondents raised three preliminary issues. All but one of these points was seriously pursued and calls for determination by this court.

1. Non compliance with Companies (Winding-Up) Rules, 1972

The respondent averred that the application before the court does not comply with the provisions of section 5 of the Companies (Winding Up), Rules 1972 RGN 841 of 1972, neither does applicant show any awareness of those rules. Resultantly, it is argued, this application fails to comply with section 5 (1) (a) of the Rules. It is beyond dispute that the clear provision of Rule 5 of the (Winding Up) Rules requires a petition for the winding-up of a company to state:-

"the capital, object, and nature of the company"

The issue to be decided is however, whether the failure to state those terms as stipulated in the Rules is fatal to the present application. The respondent contends that in application proceedings an application stands to be determined on the basis upon which it has been made. Put differently, an application based on a defective or inadequate founding affidavit must be dismissed.

In my view, when determining whether the application for a winding-up of a company is fatally defective by reason of non-compliance with the rules, one has to consider whether the failure to state the capital, object and nature of the company is relevant to the issues brought before this court for the winding-up of respondent. As was stated by VAN WINSEN AJA in *Federated Trust Ltd* v *Botha* 1978 (3) SA 645 (A) at 654C – D, albeit in different circumstances;

> "Rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts …"

I am persuaded by Mr *de Bourbon's* argument that the point taken on behalf of the respondent "propounds no more than sterile formalism". See *Jockey Club of South Africa* v *Forbes* 1993 (1) SA 649 at 663 where the learned KRIEGLER AJA, stated:

> "This case is a good example of the stultification inherent in reading Rule 53 as a law of the Medes and Persians …"

The above position finds favour in the case of *Scottish Rhodesian Finance Ltd* v *Honiball* 1973 (2) SA 747 (R) at p 748 where BECK J stated as follows:

> "The Rules of court are not laws of the Medes and Persians and in suitable cases the court will not suffer sensible arrangements between the parties to be sacrificed on the altar of slavish obedience to the letter of Rules."

I hold the view, therefore that the omission of certain formal allegations in the application which are not relevant to the issues before this court do not render the application defective and bad in law. The decision of the Supreme Court in *African Gold (Zimbabwe) (Pvt) Ltd* v *Modest (Pvt) Ltd* 1999 (2) ZLR 61 (SC) did not deal with the issue before this court, and specifically did not deal with the general applicability of Rule 5 of the Winding Up Rules, and therefore affords no authority for the preliminary point taken by the respondent. In that matter the requirement of service upon the company, stipulated in Rule 5 (2) had not been met. Because no notice had been given the provisional order of liquidation was set aside. That is not the position in this matter. In this matter the omission relates to the failure to state the "capital, object and nature of

the company", in the founding affidavit. I take the view that the omission does not offend any notions of justice or rules of the common law. I therefore dismiss the first preliminary point.

Prescription

The second preliminary point taken by the respondent is that applicant seeks the liquidation of the respondent on the basis of claims that have prescribed. It is argued that once a claim is prescribed it cannot be revived. It is contended further that the payment which applicant seeks to enforce is for debts which arose from 2009 to 2014. Given that the proceedings were instituted in April 2015, all claims going up to March 2012 are prescribed. Respondent contends that applicant's right to seek liquidation of the respondent has also prescribed and the application ought to fail on that basis.

The difficulty in respondent's argument on prescription is that it is not stated what portion of the debt is prescribed. It is common cause that on 28 November 2013 the respondent signed an agreement undertaking to make certain payments to the applicant, including an amount relating to what was referred to as the "Legacy Debt". In its opposing affidavit, Richard Davies, a Finance Officer employed by the respondent deals with the issue of prescription as follows"

> *"The applicant in this matter is seeking payment for fertilizer that was delivered during the period 2009 to 2014. However, a portion of the applicant's claim is clearly prescribed by section 15 of the Prescription Act (Chapter 8:11). I am advised and verily believe that the applicant can only claim payment for fertilizer supplied for the period 2012 to 2014. It's a result applicant's claim against the respondent is significantly reduced and this will in fact result in a material dispute of fact."*

The debt ensuing from the Memorandum of Agreement dated 28 November 2013, was clearly not prescribed. In fact, the argument by the respondent is that there is a dispute regarding the amounts owed by the respondents. The point taken on prescription was therefore not well taken and I dismiss this point.

Jurisdiction

The third preliminary point taken by the respondent is that the present application should have been brought in the High Court in Harare and not before the High Court in Bulawayo. This point was not seriously pursued by the respondent suffice it to state that the High Court at Bulawayo has equal jurisdiction to the High Court at Harare. It has been customary for the sake of convenience to the litigants for parties to file their claims in Harare where all the respective parties all operate from Harare. Where the parties are located in Bulawayo it has also been traditional for proceedings to be instituted at Bulawayo as this has a direct bearing on costs. I do not consider that there is any relevant factor that would oust the jurisdiction of this court in this matter. The matter is already before the court and since the filing of the application in April 2015 the parties have filed extensive papers arguing the respective positions of the parties. In the result, the preliminary point on the aspect of jurisdiction is of no moment.

I did not deal with the rest of the preliminary issues raised in the papers as these were not pursued in oral argument and were therefore deemed abandoned.

The Winding-Up

In terms of section 206 (f) of the Companies Act, a company may be wound up by the court if it is unable to pay its debts. In terms of section 205 of that Act, a company will be deemed to be unable to pay its debts in the circumstances set out. So far as is relevant to the present matter, paragraphs (a) and (c) of that section provide as follows:

> "A company shall be deemed to be unable to pay its debts –
> (a) if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred United States dollars then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
> (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

The applicant contends that as far as the requirements of paragraph (a) of section 205 are concerned the applicant caused to be served by the Deputy Sheriff a demand requiring the respondent to pay the outstanding debt within a three week period.

Service of the demand was effected on the respondent's legal practitioners on 14 October 2014. The response from the respondent through its legal practitioners was sent via a letter dated 3 November 2014. The applicant contends that since the debt outstanding is in excess of the statutory limit, the requirements of section 205 (a) of the Act result in it being deemed that the respondent is unable to pay its debts. It was argued by Mr *de Bourbon*, for the applicants, passionately, that the general rule is that since the respondent cannot meet its day to day obligations, and pay its debts, creditors are entitled to an order *ex debito justitae*, save in exceptional circumstances. It was argued that the court has a very narrow discretion on the matter where it is established that the debtor is unable to pay its debts.

I must observe that the applicant appears to be the only creditor that has chosen to apply for the liquidation of the respondent. The court has not been favoured with any details of any other major creditors pursuing the respondent for non- payment of debts. It is trite law that for an order for liquidation to be granted, the court must be satisfied that the applicant has proved that the respondent is insolvent and is not able to meet its financial obligations. An order for liquidation will not be granted under circumstances where the petitioner seeks to abuse the process of the court by pursuing some ulterior design.

In the case of *Dominion Trading FC – LLC* v *Victoria Foods (Pvt) Ltd* HH-324-13, the court stated at page 8 – 9 as follows:

> "It occurs to me that the insistence of the applicant on a winding up against this background is indicative of an abuse of process, the employment of the judicial process for a purpose other than that for which it was intended … This is unacceptable as it amounts to harassment of the respondent."

It seems to me that there is ample evidence in this matter to show that there is a genuine dispute regarding the applicant's claims. It is a basic principle of our law that an applicant must establish and prove its claims. What the applicant seeks to avoid is to sue out a summons against the respondent as the claim will lead to a trial action. The applicant may not avoid proving its claims by seeking the liquidation of the respondent. The respondent's defence to the claims is that certain figures were inflated resulting in gross over pricing. That defence has not been tested. The existence and extent of the debt needs to be readily ascertainable. In view of the apparent disputes of fact in the matter, which abound, the court has a discretion in its consideration for an application for a liquidation order.

This court must take into account the fact that the respondent has not been proved to be insolvent. Respondent has stated that it has sufficient money to pay the applicant, but will not tender payment until the fair market value or rate prevailing at the time the fertilizer was delivered has been determined and affixed to the quantity of fertilizer that was supplied. The respondent's assertion that it has assets in excess of US$6 million has not been controverted by the applicant.

I must turn to consider the issue of the notice given to the respondent in terms of section 205 of the Companies Act. Applicant has referred, for its contention that the respondent is insolvent to the case of *De Waard* v *Andrew & Thiehaus Ltd* 1907 TS 727 at 733, where INNES CJ stated as follows:-

> "Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him; first, a judgment is obtained against him then a writ is taken out, and he must expect, if he does not satisfy the claim, that his estate will be sequestrated. Of course, the court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says: "I am sorry that I cannot pay my creditors, but my assets, far exceed my liabilities. To my mind the best proof of solvency is that a man should pay his debts, and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

In this matter, there can be no doubt that the applicant has not sued out a summons against the respondent. The applicant has not sought and obtained judgment against respondent. The applicant has not obtained a writ of execution against the respondent. I have already observed that the respondent's claims are disputed. The basis of the dispute is known to the applicant. The applicant has not sought to obtain judgment, preferring instead to proceed with an application for liquidation. The explanation for the adoption of this procedure is that the respondent is by all accounts "commercially insolvent."

In *Badenhorst* v *Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T), Hiemstra J, referred with approval to the following extract from *Buckley's On Companies*:

> *"A winding-up petition is not a legitimate means of setting to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstance may be stigmatized as scandalous abuse of the process of court.*
>
> *Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on petition and make the order."*

In the circumstances, I find that the respondent has succeeded in establishing that the debt is disputed on *bona fide* and reasonable grounds which can only be resolved by way of action proceedings. Further, and in any event, the applicant has not proved that the respondent is insolvent. The respondent has indicated that it has secured adequate finance to settle the applicant's claims once these are established. It seems to me that the winding-up order has been instituted to harass the respondent and compel it to pay the disputed amounts. I have reached this conclusion because inspite of the respondent's demands to reconcile the disputed invoices, particularly to attend to the "irregular" pricing of fertilizer the applicant has spurned all attempts to do so.

I would, accordingly, exercise my discretion on the matter, and dismiss the application with costs.

Matzanadzo & Warhurst c/o Coghlan & Welsh, applicant's legal practitioners
Ahmed & Ziyambi c/o Webb, Low & Barry, respondent's legal practitioners