PIONEER TRANSPORT (PVT) LTD

(FOR A FINAL ORDER FOR ITS JUDICIAL MANAGEMENT
AND THE APPOINTMENT OF A FINAL JUDICIAL MANAGER)

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15 February 2018 and 9 April, 2018

Opposed Application

B Mushamiri, for the applicant
D Ochieng, for the respondent

MANGOTA J: The applicant is a haulage transporter. It transports:

(a) mining equipment and products;

(b) grain;

(c) cement and hardware. Its major clients comprise:

(i) manufacturers

(ii) cement producers;

(iii) non-governmental organisations – and

(iv) government departments as well as

(v) private business which includes manufacturers and traders' products.

On 29 June 2016, the court placed the applicant under provisional judicial management. It did so at the instance of the applicant. It appointed Dr Wesley Sibanda as the applicant's provisional judicial manager.

The current matter is an extension of what the court granted to the applicant on 29 June, 2016. The applicant moved the court to grant to it a final judicial management order. It submitted that its turn-around prospects were very high. It anchored its assertions on three matters. These comprised:

(a) the Master's report;

(b) the provisional judicial manager's report/recommendations – and

(c) the contents of the creditors' meeting of 31 August, 2016.

Among the applicant's twenty-eight (28) creditors, only the respondent opposed the

application. It filed its notice of apposition on 4 October, 2016 against the deadline of 26 September, 2016.

The applicant's initial position was that the respondent should not be heard. It submitted that it filed it opposing papers out of time and was, therefore, barred.

During the hearing of the application, the applicant, to its credit, softened its position. It stated that it would not oppose the upliftment of the bar. The bar was, accordingly, uplifted.

The respondent's *in limine* matter was that the application was defective for want of compliance with the mandatory provisions of the Companies Act. It criticised the applicant's resolution which it said was an ordinary, as opposed to a special, resolution. It submitted that a special resolution required a meeting of shareholders and not of the board of directors. It insisted that there was no special resolution which had been passed authorising the deponent to the founding affidavit to place the applicant under judicial management. It stated, on the merits, that the applicant could not pay its debts. It said no employee of the applicant held shares in the latter. It denied that the directors of the applicant did have the skills and expertise to run the applicant. It submitted that the applicant's situation was deteriorating. It stated that the applicant should be wound up to ensure that all its creditors were treated equally. It alleged that the applicant had been preferring one creditor over another. It averred that the applicant's payment of its debt might support the proposition that the applicant was on a recovery path. It moved the court to either dismiss the application altogether or to convert the same into one for winding up.

Because the respondent stated as it did as regards to the debt which the applicant owed to it and because the applicant had expressed a willingness to pay off the debt, I, at the close of submissions, issued a directive which was binding on the applicant and the respondent. The directive read:

> "(1) Applicant shall file written evidence on or before, 23 February, 2018 showing that it paid the respondent's debt in full.
>
> (2) Respondent shall confirm, on or before 27 February, 2018 that it has received full payment from the applicant."

The applicant complied with the directive. It submitted evidence which showed that it paid the total sum of $39 706.89 to the respondent. It produced the evidence through a letter which it addressed to the registrar of this court. The letter to which were attached its schedules of payments is dated 22 February, 2018. It reached the registrar's office on 23 February, 2018.

The respondent did not comply with the directive. It did not write to confirm or deny that the applicant liquidated its indebtedness to it. It simply remained mute on the matter.

The calculations I was pleased to make showed that the applicant paid the total sum of $39 706-85 to the respondent. The sum is broken down as follows:

Pay date	Batch number	Amount in US$
29/01/18	003799	3 000.00
20/02/18	003863	26 706.89
15/01/18	payment advice	4 000.00
20/10/17	003425	3 000.00
24/03/17	000822	3 000.00
	Grand total paid	39 706.89

A reading of the minutes of the creditors' meeting of 31 August, 2016 lists the respondent as one of the applicant's creditors. The minutes record that the respondent is owed $36 140.00 by the applicant. When what is owed is read together with what was paid, it is evident that the applicant liquidated its total indebtedness to the respondent.

Whether or not the payment which the applicant made to the respondent is indicative of the fact that the applicant is on the recovery path will be decided in due course. What the court must focus its attention upon, at this stage, is whether the application is fatally flawed as the respondent alleged or it is not defective at all as the applicant contended.

The applicant's former owners are Unifreight Africa Limited. These sold the applicant to employees of Pioneer Transport (Private) Limited. The parties entered into a share sale and purchase agreement. They did so on 24 April, 2015. Reference is made in this regard to Annexure 4 which the applicant attached to its application.

Clause 1.3 of the annexure defines the purchasers to comprise permanent employees of Pioneer Transport (Pvt) Ltd. It makes reference to employees who were employed as at the date of the signature of the agreement. These included both managerial and general employees.

The applicant's assertion was that the issue of applying for its placement under judicial management was discussed by all the employees in several meetings that were held at the applicant's premises from as far back as January, 2016. It stated that all of the applicant's employees approved the placement of the applicant under judicial management. It submitted that the board of directors which resolved to place the applicant under judicial management simply rubber-stamped what all the employees had agreed upon in previous meetings. It said the board's position represented the views of the applicant's employees who are its

shareholders. It insisted that the resolution which the applicant's shareholders passed was, therefore, valid.

Given the status of the applicant vis-à-vis its employees who are its shareholders, the resolution which the board of directors passed cannot be said to be invalid. A *fortiori* when the above assertions of the applicant remain uncontroverted.

The respondent was not privy to the meetings which the shareholders of the applicant held. It cannot, therefore, challenge the applicant's assertions which are to the effect that its shareholders agreed to place it under judicial management. The respondent's criticism of the resolution would, in my view, relate to its form as opposed to its substance. That criticism would, however, not stand as long as the substance of the resolution meets, as the applicant stated, the provisions of the Companies Act [*Chapter 24:03*].

The applicant's further argument was that judicial management is separate and distinct from the process of winding up a company. It submitted that a reading of s 299 (1) of the Companies Act upon which it rested its application with s 207 (1) of the same supports the view that it does not require a special resolution to place it under judicial management. It insisted that s 206 (a) of the Companies Act was irrelevant to the issue of its judicial management.

That there is a world of difference between the process of judicial management and that of winding up a company requires little, if any, debate. The aim and object of judicial management are to nurse the company which is on its death bed so that it is able to come back to life, be on its feet and commence to run, if not to fly. Any shareholder who wants the company in which he has interest would not oppose the placement of the company under judicial management. He would, if anything, move along with the views of the directors where these pass a resolution to place the company which is at his heart under judicial management. He would not require/wait for a special resolution to be passed by all the shareholders before judicial management is allowed to take effect. That is so as the object of the process is to kick start a dying entity in which he has an interest. If the entity dies whilst awaiting the process of the shareholders' meeting to pass the special resolution, shareholders will be adversely affected much to their displeasure.

Section 206 of the Companies Act makes reference to the process of winding up a company. Where a company decides to go into that process, a special resolution by its shareholders is required. Winding up simply taken means undoing the company, killing it if a comparison may be favoured.

The issue of the special resolution was made a requirement for obvious reasons. It disenables directors of a company from deciding, on their own, to undoing or killing the company outside the knowledge and/or consent of its owners. It was for the mentioned reason, if for no other, that the law insisted, and still insists, that winding up by the company can only occur where the company- ie directors and shareholders - has decided that it be wound-up.

The applicant was, in my view, correct when it stated that it did not require a special resolution for its placement under judicial management. The process is for its own good. Its directors can, therefore, decide such a matter without referring the same to its shareholders. They are, after all, appointed to act in the best interests of the company.

The respondent's *in limine* matter cannot hold. It cannot do so for two reasons. The first is that the shareholders of the applicant resolved, in substance, that it be placed under judicial management. The second is that the resolution which it passed suffices for the purpose of its placement under judicial management.

The respondent made a number of sweeping statements in its opposition to the application. It, for instance, stated that:

'(a) the applicant preferred one creditor over other creditors;
(b) the applicant's situation was deteriorating and creditors had a duty to mitigate their potential losses;
(c) creditors were calling for the applicant's day of reckoning;
(d) the applicant was unlikely to receive credit or loans;
(e) it was fair to all creditors if the applicant was placed into liquidation;
(f) the applicant was over estimating its ability to trade out of its current diabolical state of affairs;

The respondent, it is observed, did not substantiate what it meant when it stated that the applicant was preferring one creditor over other creditors. Nor did it tender any evidence which showed that the applicant's situation was deteriorating. Its assertion which was to the effect that the applicant's creditors should be allowed to mitigate their potential losses stands in contrast to the position which the creditors took at their meeting of 31 August, 2016. They all agreed to place the applicant under final judicial management. It is, therefore, not clear which creditor(s), other than the respondent itself, was the respondent speaking for when it stated as it did. It purported to speak for creditors when it was speaking for itself. Its last abovementioned statement shows nothing but its *mala fides* in opposing the application. The phrase <u>diabolical</u>

state of affairs which it employed is clear evidence of its intention to have the applicant placed under liquidation.

MUTEMA J stated in *Ellingbarn* v *Assistant Master of the High Court,* HB 82/13 that:

> "….. judicial management is premised on the pedestal that a company has failed to be viable due to mismanagement which can be corrected by a judicial manager."

TAKUVA J made some incisive remarks on what test should be applied when the issue of judicial management is under consideration. The learned judge stated in *Benny Hlatshwayo & 14 Ors* v *Geozing Pawnbrokers,* HH 117/16 that:

> "…. The test is whether or not there is a reasonable possibility that the company, if placed under judicial management, will be enabled to become a successful concern and that it is just and equitable to grant such an order ……."

Feigenbaum & Anor v *Germanius & Ors,* 1998 (1) ZLR 286 (HC) has some very useful *dicta* on the concept of judicial management. It held that:

> "Judicial management is an extraordinary procedure available to a company in special circumstances for statutory prescribed purpose and it is only adopted when the court is satisfied that there is a reasonable possibility that, if placed under judicial management, a company which is unable to pay its debts will be able to do so in full, meet its obligations and become a successful concern."

I remain satisfied that the applicant met the debt which it owed to the respondent in full. That fact alone renders the respondent's opposition to the application unnecessary. It stands to good logic and reason that, if the applicant had paid the respondent's debt in full before the application, the probabilities are that the matter would have been enrolled on the unopposed roll.

My views in the above mentioned regard find support from the attitude of the applicant's creditors. These, it has already been stated, supported the proposition that it be placed under final judicial management. They all nominated Dr Sibanda to conduct the final judicial management process. No creditor, therefore, would have opposed the placement of the applicant under judicial management.

The Master's report which is a *sine qua non* aspect of this application was loud and clear. It stated that the applicant appeared to get a good volume of business. It made reference to such of its high quality customers as the World Food Programme and Mimosa Mining Company. It remained of the view that the projected cash flow and income statements which the applicant availed to the Master were prudent. Its last word on the applicant was that the latter was a good candidate for judicial management. It rated the judicial manager, Dr Sibanda,

very highly. It said he was a seasoned judicial manager who had cutting-edge skills which would enable him to turn around the applicant's fortunes within a reasonable period of time.

The judicial manager's recommendations are apposite. He proposed that:

'(i) the employees and management of the applicant, as shareholders, would recapitalise the applicant;

(ii) he would negotiate with Unifreight to convert the sum of $350 578 which the applicant owes to it for a 4 year repayment period to a 10 year redeemable preference shares of $1.00 each fully paid;

(iii) he would discuss and agree with it on the issue of the dividend rate;

The judicial manager's very reasonable view was that, if his abovementioned proposals found favour with the applicant's shareholders and Unifreight, liabilities of the applicant would be reduced by $1 835 168. Where that happens, he said, the applicant would have a bankable balance sheet with which it would negotiate borrowing facilities which would fund its working capital.

The provisional manager's report showed that he managed to increase the applicant's fleet including some of its trucks which were non-functional. It showed, further, that the applicant's situation has improved from the time that the judicial management process commenced.

It is evident, from the foregoing, that the application is not without merit. It will, therefore, not be in the interests of the applicant to refuse the application. It is, in other words, not just and equitable to refuse the placement of the applicant under judicial management.

The court has considered all the circumstances of this application. It is satisfied that the applicant proved its case on a balance of probabilities. The application is, accordingly, granted as prayed in the draft order.

Mbidzo Muchadehama & Makoni, applicant's legal practitioners
Matizanadzo & Warhurst, respondent's legal practitioners