

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2019/HPC/0515

**IN THE MATTER OF : WINDING UP PETITION OF
TRANSQUIC SERVICES LIMITED**

**IN THE MATTER OF SECTION 57 (1) (B) OF THE
CORPORATE INSOLVENCY ACT**

BETWEEN:



STANBIC BANK ZAMBIA LIMITED

PETITIONER

AND

TRANSQUIC SERVICES LIMITED

RESPONDENT

**Before Mr. Justice Bonaventure C. Mbewe in Chambers on the
31st day of January, 2020.**

*For the Petitioner : Mr. L. Mwamba from Messrs. Simeza
Sangwa and Associates*

*For the Respondent : Ms. C. Mazakaza of Messrs. Leonard
Lane and Partners*

R U L I N G

Authorities Referred to:



1. *The Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia*
2. *Statutory Instrument No. 86 of 2004 of the Laws of Zambia, The Companies (Winding Up) Rules 2004*
3. *Swan Millers Limited Winding Up Cause No. 16 of 2008 (Kenyan authority)*
4. *Rajendra Sombhai Patel and Another v Rana Marketing Limited 2015/HPC/0153*
5. *Development Bank of Zambia and KPMG Peat Marwick V Sunvest Ltd and Sun Pharmaceuticals Ltd (1995- 1997) ZR 187*
6. *Zambian Civil Procedure - Commentary and Cases, Hon. Justice, Dr. Patrick Matibini Volume 1, Lexis Nexis, Durban 2017 at Page 322*

This is a winding up petition brought by the Petitioner Stanbic Bank Zambia Limited against the Respondent, Transquic Services Limited, a limited liability Company incorporated under the Companies Act. The Petition is made under **Section 57 (1) (b) of the Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia.**

The Winding Up Petition was filed on 18th November, 2019 and is accompanied by an Affidavit Verifying Petition deposed to by one Rueben Malindi who deposes that he is the Head of Rehabilitation and Recoveries in the Petitioner Bank and is competent to depose thereto on behalf of the Petitioner.

The Petition shows that the Respondent is a Private Limited Liability Company incorporated on 8th November, 2012 with its Registered Office at Plot No. 23663, Off Great East road, Avondale Lusaka and having a nominal capital of K15,000.00 divided into 15,000 shares of K1.00 each. That the amount of the capital paid up or credited is unknown.

The Petition shows that the Petitioner was awarded costs by the High Court which costs were subsequently taxed in the sum of ZMW160,289.08 which is a debt owing to the Petitioner from the Respondent. The Petitioner has on numerous occasions made demand for the payment of the said sum and made various attempts to recover the sum including through levying execution on the Respondent.

That on 30th September, 2019, the Petitioner served a statutory demand notice on the Respondent demanding settlement of the debt within 30 days and close to six weeks had since lapsed and the Respondent neglected or refused to settle the debt or make any offer to the Petitioner and that the Respondent is indebted to several other creditors some of who have issued court process against the Respondent. It is the Petitioner's prayer that in the circumstances it is just and equitable that the Respondent be wound up to protect unsuspecting members of the public from any dealings with it.

The Petition prayed for the following relief;

1. *Transquic Services Limited, Company Registration Number 120120106894 be wound up by the Court under the provisions of Section 57 (3) (a) (i) and (ii) of the Corporate Insolvency Act. No. 9 of 2017;*
2. *Such other Order may be made as the Court shall deem fit; and*
3. *Costs of this petition.*

The Verifying Affidavit of Reuben Malindi, attests that the factual assertions stated therein are true and correct and goes on to produce a copy of the Allocatur under the hand of the High Court Taxing Master dated 30th July, 2019 marked "RM1", a letter addressed to the Respondent's Advocates serving the Allocatur dated 30th July, 2019 and marked as "RM2" as well as the statutory demand notice dated 30th September, 2019 and marked as "RM3".

At the hearing of the Petition, the Petitioner's Counsel Mr. Mwamba chose to lead evidence from a witness in support of the Petition.

The evidence of Wezi Luhanga a Team Leader, Specialized Recoveries in the Petitioner Bank, stated that the matter came to his knowledge when the Respondent was failing to meet monthly lease obligations and the Bank proceeded to effect recovery of the

leased asset after which the Respondent obtained an injunction restraining the Bank from repossessing the asset. This injunction was subsequently thrown out giving rise to the debt for K166,000.00 in respect of that case. The witness testified that the Respondent has not paid the amount due to the Petitioner and that he wished to adopt the affidavit of Reuben Malindi as part of his evidence. The witness testified that to the best of his knowledge, the Respondent owes other creditors Commercial Motors Ltd an amount of \$40,000.00 and Avis \$60,000. In response to Transquic's claim that it has the cash flow to pay the debt, the witness testified that there has only been a deposit of ZMW2,500.00 in the past three months on the Respondent's account. Transquic had proposed to pay ZMW20,000.00 per month which proposal was rejected as being too minimal to what was owed amidst other creditor's claims of \$40,000.00 and \$60,000.00 leading the Bank to conclude that the Respondent was unable to even pay the K20,00.00 proposed to the Petitioner and therefore unable to pay its debts as fell due.

The witness further testified that the Respondent is of no fixed abode as it is not operating from the Avondale address given. The Petitioner is therefore asking the Bank for an order for the Respondent to be wound up.

In cross examination, the witness informed the Court that the Petitioner rejected the Respondent's proposal for ZMW20,000.00 on account of being lower than what the Petitioner expected and

the said proposal was rejected through discussions held with the Respondent. He informed the Court that if the Respondent had a better proposal, it should have come back to the Petitioner with this. It was the witnesses' testimony that one of the other creditors approached the Bank because it was unable to get in touch with the Respondent and the Customer (Respondent) has been very elusive about its address.

The Respondent filed an Affidavit in Opposition to the Petition, filed into Court on 28th January, 2020 and deposed to by one Samson Zulu a Director in the Respondent Company who deposed that he has authority to depose to the affidavit.

The Affidavit deposes that Paragraphs 4, 5 and 6 of the Verifying Affidavit are not in dispute which paragraphs depose that the Petitioner was awarded costs by the High Court which costs were subsequently taxed in the sum of ZMW160,289.08 which is a debt owing to the Petitioner from the Respondent and that the Petitioner has on numerous occasions made demands for the payment of the said sum and made various attempts to recover the sum through levying execution on the Respondent.

The Respondent deposes that it is not insolvent as alleged by the Petitioner as it is operational and has stable financial inflow and has produced a bank statement in an account at Zanaco showing 2 deposits totaling K2,587.00 in the period 1st October, 2019 to

24th January, 2020, the date of the statement. The affidavit deposes that the Petitioner did not make demands for payment on numerous occasions but only sent the Allocator immediately after taxation and a statutory demand notice on 30th September, 2019 and there has been no attempt to levy execution on it as no evidence has been adduced of this. That the Petitioner out rightly rejected its offer to resolve the issue of costs amicably and the cause that led to the costs is still before the courts under Cause No. 2019/HPC/0048, wherein, it is Plaintiff and the Petitioner Respondent. The Respondent alleges that this current Petition is an attempt by the Petitioner to frustrate the proceedings in the cited case.

The affidavit attests that it is not true that the Respondent is indebted to several other creditors but merely interacts with several business houses in line with its corporate objectives and the Petition is premature as the petitioner has not exhausted all laid down avenues for recovery of the amount owed by the Respondent. The Respondent asserts that the Petitioner is the one that owes it colossal amounts of money and there would be no justification in winding up of the Respondent when it has shown its ability to pay and is still willing to do so as was proposed earlier to the Petitioner.

The Petitioner filed written submissions in the matter whereas the Respondent has not done so.

The Petitioner's submissions set out the law under which the Petition is brought namely **Sections 56 and 57 of the Corporate Insolvency Act No. 9 of 2017** relying on the provisions as relates to a company failing to pay its debt after due service of a written demand by a creditor as contained in **Section 57 (1) (b)**. The Petitioner cites several Kenyan authorities that deal with, when a company is deemed unable to pay its debt and also **Swan Millers Limited Winding Up Cause No. 16 of 2008** (Kenyan authority) which dealt with Section 220 (a) of the Companies Act of Kenya that is worded in the same way as **Section 57 (1) of the Corporate Insolvency Act** of Zambia. The Petitioner cites the case of **Rajendra Sombhai Patel and Another v. Rana Marketing Limited 2015/HPC/0153** which it submits is on all fours with the current case before this Court. In that case the Court made an order to wind up the respondent company on grounds that it had failed to settle a debt following a statutory demand notice requiring the Respondent therein to pay the sum owed within 21 days from the date of the notice. The Petitioner summarizes the evidence presented before the Court and submits that this is a fit and proper case for the Court to make a winding up order as the Respondent is unable to pay its debts within the meaning of **Section 57 (3) (a) of the Corporate Insolvency Act** warranting the winding up order to be made.

I have considered the Petition for winding up of the Respondent Company before me, and the arguments made for and against the Petition and I find that I have jurisdiction to hear the Petition

under **Section 55 of the Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia** as read with **Section 56 of the Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia**.

Section 55 of the Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia states that:

“The Court has jurisdiction to wind-up in accordance with this Act, a body corporate incorporated in -

(a) Zambia:”

Section 56 of the Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia reads;

“(1) Subject to this section, a company may be wound up by the Court on the petition of -

(b) A creditor, including a contingent or prospective creditor of the company:”

In the Interpretation Section of the **Corporate Insolvency Act, Section 2, “Court” means High Court for Zambia** and **“Creditor” means a person who is entitled to claim that debt is owing to that person by a company and includes a person entitled to enforce a final judgment or order of the Court.”**

The Petition is therefore before the correct Court and has been brought by a party that is allowed under the **Corporate Insolvency Act**, to so bring a winding up Petition.

The law on Insolvency is now governed by the **Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia** which provides for circumstances for the winding-up of a company by the Court in the following sections.

Section 57 (1) (b) and (g) of the Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia provides that;

“The Court may order the winding-up of a company on the petition of a person other than the Official Receiver if-

(b)The company is unable to pay its debts;

(g) in the opinion of the Court, it is just and equitable that the company should be wound-up.

Section 57 (3) of the Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia provides that;

“(3) For the purposes of this section, a company is unable to pay its debts if-

(a) There is due, from the company to any creditor, including a creditor by assignment, a prescribed fee, and

(i) The creditor has, more than thirty days previously served on the Company a written demand requiring the company to pay the amount due; and

(ii) the company has failed to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) The company is unable to pay its debts as they fall due

(4) The Court shall, in determining whether a company is unable to pay its debts, take into account the contingent and prospective liabilities of the company.”

On the totality of the facts adduced in the Petition and verified by the Verifying affidavit and the evidence of Wezi Luhanga, I find that the Petitioner is owed a debt by the Respondent in the sum of ZMW160.00 as set out in the Allocatur of the Taxing Master which

debt has not been shown to have been repaid in part or in whole by the Respondent. All the Respondent has to show is a proposal to pay the debt in sum of ZMW20,000.00 per month exhibited as "SZ2a" in the Respondent's Affidavit in Opposition which proposal was promptly and out rightly rejected by the Petitioner vide letter dated 9th September, 2019 exhibited as "SZ2b" in the Respondent's Affidavit in opposition.

I find as a fact that the Respondent by the bank statement exhibited as "SZ1", only deposited an amount totaling ZMW2,587.00 between 1st October 2019 and 24th January, 2020 which is not synonymous with a company claiming to have a stable financial inflow and one that is not insolvent. The Respondent, though making proposals to pay the debt in monthly instalments of ZMW20,000.00 has not provided any evidence of having such cash readily available or able to consistently generate amounts of this nature. There is no satisfactory explanation of why the Respondent has failed to pay its debts including or evidence to back its assertion that it is not true that the correct position regarding other debts the petitioner owes several other creditors is that it interacts with several business houses in line with its corporate objectives. The Respondent has not exhibited evidence of having any other assets or disclosed any other means of generating income to meet its obligations as they fall due or provided the Court with any details of its contingent and prospective liabilities to assist this Court under Section 57(4), meaning that at present and on the basis of the facts before the

Court, its liabilities exceed its assets and it is therefore unable to meet its obligations as they fall due. It is a fact that the Respondent has not settled any amount towards the debt claimed since 30th July, 2019 when the Allocatur was issued by the Court. The Respondent herein has been unable to pay its debt to the Petitioner as the debt fell due. Further, the Petitioner issued a statutory demand notice giving the Respondent 21 days within which to pay the amount in the Allocatur (the debt) which the Respondent has failed to pay to date.

The Allocatur was issued in the cause 2019/HPC/0027 and the Respondent claims it has another cause of action against the Petitioner being 2019/HPC/0048, which cause, I opine is not a defence the Respondent can put up against the claim herein and is a multiplicity of actions as it appears to arise from the same set of facts as the cause in which the Allocatur was issued (which is the lease of the asset repossessed by the Petitioner) and the Respondent should have argued its claims in that cause in the cause 2019/HPC/0027. The Courts have frowned on parties commencing multiplicity of procedures, proceedings and indeed multiplicity of actions over the same subject matter as stated by the Supreme Court in the case of **Development Bank of Zambia and KPMG Peat Marwick v. Sunvest Ltd and Sun Pharmaceuticals Ltd (1995- 1997) ZR 187**. The learned author **Hon. Justice, Dr. Patrick Matibini** in his treatise **Zambian Civil Procedure Commentary and Cases at Page 322** states that **“Initiation of a multiplicity of actions on the same subject**

matter, by the same parties, simply amounts to abuse of the court process.”

I adopt the Supreme Court’s view on multiplicity of actions to the case *in casu* seeing as 2019/HPC/0027 was commenced before 2019/HPC/0048 and find the Respondent’s attempt to use this later case as a rallying point before this Court, to allege that the cause that led to the costs in question is still running and the Petitioner is attempting to frustrate that case to be unfounded.

Having made the above findings, what then are my powers as a Court with regard to the Petition before me? These are contained in **Section 60 of the Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia**. The Section sets out the following powers;

“(1) The Court may, on hearing a winding-up petition –

(a) Grant the petition;

(b) Dismiss it with or without costs;

(3) The Court may, on the hearing of a petition or at any time on the application of the petitioner, a company or person who has given notice of intention to appear on the hearing the petition-

(a) Direct that any notice be given or steps taken before or after the hearing of the petition;

(b)Dispense with any notice being given or steps being taken which are required by or in accordance with this Act or by any prior order of the Court;

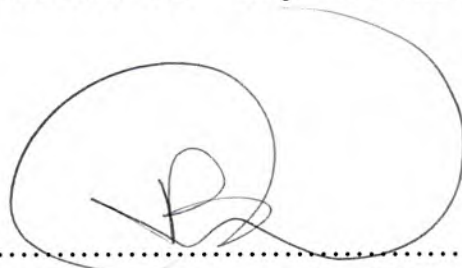
(g) give such directions as to the proceedings as the Court considers appropriate in the case.

I hereby grant the Petitioner's application under **Section 60 of the Corporate Insolvency Act No. 9 of 2017** and Order that the Respondent Company, Transquic Services Limited be wound up in accordance with the provisions of the **Corporate Insolvency Act No. 9 of 2017**.

In the absence of an application for appointment of a provisional liquidator, it is further Ordered that the Official Receiver be and is hereby appointed as Liquidator of the Respondent Company.

I award the Petitioner costs of the Petition to be paid out of the assets of the Company.

Delivered at Lusaka this 25th day of February, 2020

A handwritten signature in black ink, consisting of a large, stylized 'B' and 'M' intertwined, enclosed within a large, loopy oval shape. The signature is positioned above a horizontal dotted line.

**Bonaventure C. Mbewe
HIGH COURT JUDGE**