Judge

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Division)

2021/HPC/0499

IN THE MATTER OF	:	FIDELITY SECURITY LIMITED
IN THE MATTER OF	:	AN APPLICATION TO WIND-UP A COMPANY BY THE COURT
IN THE MATTER OF	:	SECTION 55,56 (1) (B), 60 AND 67 OF THE CORPORATE INSOLVENCY ACT, 2017

BETWEEN:

FIDELITY SECURITY SERVICES (PTY) LIMITED	PETITIONER
AND	
FIDELITY SECURITY SERVICES ZAMBIA LIMITED	RESPONDENT

Before Lady Justice B.G. Shonga this 27th day of September, 2022

For the Petitioner, Mr. J. Ngisi, Messrs. Chibesakunda & Co.

JUDGMENT

Cases Referred to:

1. ***Mann v. Goldstein [1968] 1WLR 1091.***
2. ***Re Cheyne Finance Plc [2008] 2 All ER 987.***
3. ***BNY Corporate Trustees Services Ltd v Eurosail*** [2013] UKSC 28
4. ***Re Blériot Manufacturing Aircraft Co. [1917] HBR 279(Ch.)***

5. ***Byblos Bank SAL v. Al-Khudhairy [1987] BCLC 232 at p.247***

Legislation and Other Material Referred to:

1. ***Corporate Insolvency Act, 2017: sections 49, 56, 57, 60 and 67.***
2. ***Companies (Winding-up) Rules 2004, Statutory Instrument No. 86 of 2004: r..4 and r.6***
3. ***Companies Act, Chapter 388 of the Laws of Zambia. (repealed)***
4. ***Companies Act, 2017: s. 34 (1) (b).***
5. ***Insolvency Act, 1986: s.123 (2).***
6. ***Companies Act, 1948: s. 233.***

Background

1. This petition is filed pursuant to ***section 56 of the Corporate Insolvency Act, 2017*** (hereinafter referred to as "the Act"). The petitioner moves the Court for an order that the respondent be wound-up by the Court. The petition was presented on 30th August, 2021.
2. The petition was first scheduled to be heard on 1st February, 2022. When the matter came up for hearing, I was not satisfied that the petition had been served or advertised in accordance with the ***Companies (Winding-up) Rules 2004, Statutory Instrument No. 86 of 2004, rules 4 and 6***. Counsel acknowledged the lapse and applied for an adjournment. I allowed the application and adjourned hearing to 17th May, 2022, in accordance with ***section 60 1(c) of the Act.***
3. On 16th May, 2022, the petitioner filed an affidavit of service which revealed that it did cause the petition to be advertised

on 23rd and 24th March, 2022, in the Zambia Daily Mail, being a newspaper of general circulation in Zambia.

4. I examined the advertisement and observed that it indicated the day on which the petition was presented; the name and address of the petitioner and that of the petitioner's advocates; and it contained a note inviting any person who sought to appear on the hearing of petition, either to support or oppose the petition to give notice of that their intention to the petitioner or the petitioner's advocates.
5. In my view, since the petitioner advertised the petition in the above manner, the petitioner complied with ***rule 6 of the Companies (Winding-up) Rules 2004, Statutory Instrument No. 86 of 2004***. Therefore, I took the view that the petition was properly before me.

The Case for the Petitioner

6. The case for the petitioner is that the respondent, being a company incorporated under the laws of Zambia in 2012, is insolvent and has been unable to pay its debts as they fall due, since 2013.
7. According to Vanay Shaun Maharaj, the Financial Director in the petitioner company, and the affiant of the affidavit verifying the petition, the facts supporting the petition are as appears below.
8. The respondent was incorporated under the ***Companies Act, Chapter 388 of the Laws of Zambia***, on 13th December, 2012. A copy of the certificate of incorporation is exhibited, marked

"VSM1". The respondent's authorised share capital at incorporation was K5,000.00 divided into 5000 shares of K1 each. The respondent's registered address is plot No. 284, off Mumbwa Road Lusaka, whereas its principal place of business was 2nd floor Zamanita Industrial Complex, plot 5001 Mumbwa Road.

9. The initial shareholders, on the date of incorporation, were Noah Pasvani, Emmanuel Shiri and Mulilo Kabesha, referred to as the *"Individual Shareholders"*. The shareholding structure and particulars of the directors and shareholders at incorporation are demonstrated by exhibit marked ***"VSM2"***, Companies Form 2, the application for incorporation.

10. On 16th January, 2013, the petitioner acquired a portion of shares from the Individual Shareholders, and it became a shareholder. Subsequently, disputes arose between the shareholders. The relationship between the shareholders deteriorated, resulting in a state of animosity between them. This resulted in the Individual Shareholders selling their shares in the respondent company.

11. In 2014, the petitioner purchased all the shares held by Mulilo Kabesha and Emmanuel Shiri. This was pursuant to a share transfer agreement, exhibit marked ***"VSM 7"***. Following the transfer, Mulilo Kabesha and Emmanuel Shiri were removed from the register of shareholders. Additionally, they resigned as directors. Thereafter, the petitioner also bought Noah Pasvani's shares. This was in furtherance of a share purchase agreement, exhibit marked ***"VSM 8"***. Thus,

the petitioner eventually became the only person holding shares in the company.

12. According to the affiant, notwithstanding the share transfer from Mr. Pasvani to the petitioner, the change was not registered with the Patents and Companies Registration Agency (PACRA). The transfer was not lodged because the petitioner was aware that the Zambian Companies Act does not allow a company to have only one shareholder. Regrettably, Mr. Pasvani expired before officially finalising the transfer of shares to the petitioner.

13. The affiant also deposed that during the period of the shareholder disputes, several court actions ensued between the parties. The actions included a petition by the petitioner herein to wind-up the respondent under cause no. 2013/HPC/0462, as well as an action by the respondent against the petitioner and its director under cause no. 2013/HPC/0422. During the process, the respondent was placed under provisional liquidation.

14. Subsequently, the court actions were resolved by consent judgments. The consent order filed in 2013/HPC/0462 saw to it that both the winding-up petition and the ex parte order of the provisional liquidator, and order of confirmation relating to the respondent, were withdrawn.

15. At the time that the parties were embroiled in the disputes, the respondent lost a substantial portion of its business. This compelled the respondent to terminate all of its employment and supply agreements.

16. Owing to the shareholder disputes and operational complications, the respondent's financial performance deteriorated. Eventually, the respondent stopped operating and has not been conducting any business for the last few years.

17. To illustrate the state of the respondent's financial position, copies of the respondent's Annual Reports and Financial Statements for the years 2018 to 2022 are exhibited, collectively marked ***"VSM10"***. The deposition is that as of 28th February, 2021, the respondent's total indebtedness stood at K6, 636,639.94

18. Penultimately, the deponent avowed that the respondent is indebted to its numerous creditors as demonstrated by exhibit marked ***"VSM11"***, a list of the respondent's creditors, with details of the debts incurred.

19. Ultimately, the affiant avowed that the respondent not only lacks capacity to pay its debts to the listed creditors, but also has unsettled statutory debts owing to the Zambia Revenue Authority (ZRA) and the National Pension Scheme Authority (NAPSA).

20. It is the petitioner's position that the respondent is unable to settle its debts. Consequently, the petitioner invites the Court to order that the respondent be wound-up.

The Respondent's Answer

21. The respondent company did not offer any opposition to the petition.

22. I studied the record and noted that by affidavits of service dated 16th May, 2022, 15th June, 2022 and 4th August,2022, the petitioner demonstrated that the respondent was served with the petition, affidavit confirming winding-up and notices of hearing.

23. I accept that service on a director is proper service. My approval is premised on ***section 34 (1) (b) of the Companies Act, 2017*** which reads as follows:

> *34. (1) Despite this Act or any other law, a document may be served on a company by— (a) delivery of the document to the registered office of the company; or (b) personally serving a director or secretary of the company. (Court emphasis)*

Submissions

24. The petitioner submits that the Court has the power to wind-up a company on the petition of a member pursuant to section **56 (1) (c)** of the Act. The petitioner posits that the petitioner is a member and goes on to reason that it, therefore, holds the requisite standing to present the petition. The submission was based on the principle of requisite standing enunciated in the case of ***Mann v. Goldstein (1).*** In that case the Court made it clear that it must be shown that petitioner is entitled to present the petition.

25. As to the grounds supporting the petition, the petitioner relied on ***section 57 (1)*** of the Act and advanced two grounds: firstly, that the respondent is insolvent; and secondly, that it would be just and equitable to place the respondent into liquidation.

26. The petitioner contends that the respondent company has failed to settle its indebtedness to several creditors and as such it is unable to pay its debts as they fall due. The petitioner drew my attention to the following definition of the word "insolvent", as ascribed by ***section 2*** of the Act:

> *"'insolvent' means having liabilities that exceed the value of assets, having stopped paying debts in the ordinary course of business or being unable to pay them as they fall due;"*

27. In addition, the petitioner leaned on ***section 57 (3)*** of the Act for the definition of a company being unable to pay its debts. It reads as follows:

> *"(3) For purposes of this section, a company is unable to pay its debts if- ...*
> *(c) the company is unable to pay its debts as they fall due."*

28. Further, the petitioner pointed out that ***section 57 (4)*** of the Act instructs the Court to take into account both the company's contingent and prospective liabilities when determining whether it is unable to pay its debts. Section 57 (4) provides as follows:

> *"(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"*

29. Additionally, the petitioner highlighted that the Act provides for a "solvency test", which in section 2 is defined as follows:

> *"'solvency test'" means a test to determine that— (a) a company is able to pay its debts as they become due in the normal course of business; and (b) the value of the company's assets is greater than the value of its liabilities, including contingent liabilities;"*

30. The petitioner cited two English cases which make reference to the solvency test and whose holdings the petitioner considers corresponds well with ***section 57 (4)*** of the Act. These cases are ***Re Cheyne Finance Plc (2)*** and ***BNY Corporate Trustee Services Limited v Eurosail (3).***

31. The ***Eurosail* case** was a decision of the Supreme Court of the United Kingdom in which the Court was called to consider the proper interpretation of ***section 123(2)*** of their ***Insolvency Act 1986***, as it had been applied in commercial bond documentation. Lord Walker, gave the main judgment on the insolvency test under English law. The decision addressed how to apply the test in ***section 123(2)*** in order to determine whether a company was balance-sheet insolvent, what is called "balance-sheet test". That section provides:

> *"A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities."*

32. ***Re Cheyne***, also a UK insolvency law case, dealt with the definition of insolvency under the cash flow test. Briggs J held that a court could take into account debts that would become payable not only in the near future, but perhaps further ahead, and whether paying those debts was likely.

33. The petitioner posits that s. 57 (4) prescribes an insolvency test, which if applied to the respondent's 2018 to 2020 financial statements would reveal that the respondent is insolvent.

34. With respect to the ground of being just and equitable to wind-up the respondent, the petitioner contends that the main purpose for which the company was formed has failed because of lack of capital; that the respondent is unable to carry on business except at a loss; and that existing liabilities are in excess of existing assets. I was invited to consider the English case of ***Re Blériot Manufacturing Aircraft Co. (4)***.

Analysis of Evidence

35. From the unchallenged depositions of Vanay Shaun Maharaj contained in the affidavit accompanying the petition, I accept that the respondent is a company incorporated in Zambia. Also, that the petitioner became a shareholder in the respondent company on 16th January, 2013. Further, that during the period 2014 and 2018 the petitioner bought all the shares that were originally held by the Individual shareholders, thereby becoming the sole shareholder in the respondent company. Exhibits marked *"VSM 7"*and *"VSM 8"* support my findings.

36. In addition, I am persuaded and find that the respondent has not been conducting any business for over a year.

37. With respect to the financial position of the company, the deponent relied on the Annual Reports and Financial Statements for the period 2018 to 2020, exhibits collectively marked *"VSM 10"*. The Statement of Financial Position for the year ended February, 2020, shows that the current liabilities for that year stood at K8,663025, of which K7,111,155.00

represented an unsecured loan from the petitioner and K1,551,870 related to trade and other payables.

38. The Statement also reveals that in 2019, the respondent's current liabilities for the year ended February 2019 stood at K8,520,045, of which K6, 636,640 represented an unsecured loan from the petitioner and K1,883,405 related to trade and other payables

39. I have also studied exhibit marked *"VSM 11"*, the list of trade creditors' accruals balance as of 28 February, 2021. It shows trade creditors' accruals of K6, 636, 639.94 for the period 31st May, 2013 to 25th October, 2016. I accept that this supports the deponent's deposition that the respondent's total debt stood at K6, 636, 639.94.

40. Interestingly, I observe that the debt of K6, 636, 639.94 bears an unsettling likeness with the K6, 636,640.00 unsecured loan secured from the petitioner. From the Financial Statements before me, the loan was reflected in the Financial Statements for the year ended 28th February, 2018 as having been carried forward from the year 2017.

41. Since the debt of K6, 636, 639.94 existed as of 25th October, 2016, I am prompted to consider that the loan was obtained from the petitioner, in the form of related party borrowings, to settle the then outstanding debt. I accept that the affidavit evidence before is not sufficient for me to make this as a conclusive finding of fact. However, absence of evidence addressing the similarities between the amount averred to be trade creditors' accruals and the related party loan leads me to question whether the stated trade creditors'

accruals remain outstanding. Therefore, I am not persuaded that the respondent has any outstanding liabilities to the listed trade creditors.

42. However, I unquestionably accept that the respondent is currently not operating. Further, that at the time it ceased to do so, it had accrued trade and other payables in the sum of K1, 551 870.00 comprising trade payables of K59, 044; accrued expenses of K751,511 and employee-related liabilities in the sum of K715, 225.00.

43. Additionally, I acknowledge that as of the latest Financial Statements of February, 2020, the respondent company recorded current assets worth K5000 against recorded current liabilities of K7,111, 155. I have extracted this information from the notes to the Annual Financial Statements for the year ended 29th February, 2020.

44. As regards the statutory debts, no documentary evidence has been adduced to support the existence of unpaid statutory debts to ZRA or NAPSA. Moreover, according to the notes to the Annual Financial Statements for the year ended 29th February, 2020, the respondent had no VAT or statutory deductions payable. That being so, I am not convinced that the petitioner has demonstrated the existence of the alleged statutory debts.

45. Considering the above, I am not swayed to find that the respondent company is indebted to any trade creditors, ZRA or NAPSA.

The Law

46. ***Section 56 (1)*** of the Act sets out who can present a petition for a company to be wound-up by the Court. For the purposes of this suit, it reads as follows:

> *"56. (1) Subject to this section, a company may be wound-up by the Court on the petition of—*
> *(a) ...;*
> *(b) ... ;*
> *(c) a member; ..."*

47. ***Section 2*** of the Act defines a member as follows:

> *"member" means a shareholder or stockholder of a company or a subscriber to a company limited by guarantee;"*

48. The definition of member is expanded by ***section 49***, for the purposes of winding-up. Section 49 provides as follows:

> *"49. For the purposes of this Part, a reference to a "member" includes, unless the context otherwise requires, a reference to a person claiming or alleged to be liable to contribute to the assets of the company in a winding up for the purpose of any proceedings for determining, and proceedings prior to the final determination of, the persons who are so liable, including the presentation of a winding-up petition."*

49. In this case, I have found that the petitioner is a shareholder. It follows, therefore, that according to ***section 56 (1)*** of the Act, the petitioner falls within the category of persons who holds the requisite standing to present this petition.

50. With respect to the circumstances that justify an order for winding-up by the Court, ***section 57 (1)*** of the Act reads as follows:

"57. (1) The Court may order the winding-up of a company on the petition of a person other than the Official Receiver if—

(a) the company has by special resolution resolved that it be wound-up by the Court;
(b) the company is unable to pay its debts;
(c) the period, if any, fixed for the duration of the company by the articles expires, or an event occurs in respect of which the articles provide that the company is to be dissolved;
(d) the number of members is reduced below two;
(e) the company was formed for an unlawful purpose;
(f) the incorporation of the company was obtained fraudulently; or
(g) in the opinion of the Court, it is just and equitable that the company should be wound-up."

51. By ***section 57 (3)*** of the Act, a company is unable to pay its debts if:

a) A creditor to whom the company owes a prescribed fee has, more than thirty days previously, served on the company a written demand requiring the company to pay the amount due; and 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.

52. In this case the petitioner presents two grounds in support of its petition. The first being that the respondent is unable to pay its debts; and the second being that it would be just and equitable that the respondent should be wound-up.

53. I have carefully considered ***section 57 (3) (c)*** of the Act. It enables the court make an order for winding-up where a company is unable to pay its debts as they fall due. To arrive at a conclusion that a company is unable to pay its debts as they fall due, I must, by subsection (4) of s. 57 of the Act, take into account the contingent and prospective liabilities of the company. That, I have done.

54. In the English case of ***Byblos Bank SAL v. Al-Khudhairy (5)***, the Court considered the import of inability to pay debts within ***s.233 of the UK's Companies Act, 1948*** which was incorporated in a debenture as a trigger for the appointment of Receivers. Nicholls L.J. said:

> *"If a debt presently payable is not paid because of lack of means, that will normally be sufficient to prove that the company is unable to pay its debts. That will be so even if on an assessment of all the assets and liabilities of the company, there is a surplus of assets over liabilities. That is trite law."*

55. ***Section 233 (d)*** of the 1948 read as follows:

> *"A company shall be deemed to be unable to pay its debts—*
>
> *(d) 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.*

56. Although section 233 (d) did not incorporate the words *"as they fall due"* the way that our legislation does, in the ***Cheyne*** case the Court took the view that the assertion made by Nicholls L.J in the ***Byblos Bank*** case was speaking about

the ability of a company to meet its liabilities when they became due. The reasoning of both courts resonates with me and I adopt it.

57. I have studied the financial statements set before me and I am satisfied that the respondent has current liabilities, including trade and other payables, which it has been unable to pay because of lack of means. The incapacity to pay its debts was occasioned by the financial challenges that led it to cease operations more than a year before this petition was presented. Consequently, I am convinced that the respondent is unable to pay its debts as they fall due.

58. Turning to the invitation for me to opine that it would be just and equitable that the respondent company be wound-up, I have thoroughly read the cited case of ***Re Blériot Manufacturing Aircraft Co***. That action involved a company, Blériot Manufacturing Aircraft Co., which was incorporated to represent the well-known French Aviator Louis Blériot in England. However, after the company was formed, Blériot refused to honour the contract. The Court held that as the "substratum" (the main purpose) had failed, it was just and equitable that the company should be wound up.

59. In this case, there is no evidence before me to persuade me that the purpose, i.e. the provision of security services, has failed or is untenable. It seems to me that if the respondent was able to pay its debts as they fell due, the issue of purpose would not arise. Thus, whereas I accept that failure of substratum would be an appropriate justification

for winding-up a company under the ground of it being just and equitable, it does not apply to this particular case.

60. Recalling my earlier finding that the petitioner became the singular shareholder in the respondent company sometime before 2018, it would be remiss of me to merely blink at ***section 57 (1) (d)*** of the Act. The reduction of the number of members of a company below two is an appropriate ground upon which I may order the winding-up of the respondent.

61. Having found that: (i) the petitioner is a member, and therefore entitled to present this petition; (ii) the respondent is unable to pay its debts as they fall due; and (iii) the number of members of the respondent has reduced to below two, I grant the petition pursuant to ***section 60 (1) (a)*** of the Act and order that the respondent be wound-up.

62. Costs of this petition are awarded in favour of the petitioner, to be taxed in default of agreement.

Dated this 27th day of September, 2022

B. G. SHONGA