

AUSTIN CHINYANGARE  
For a provisional order for winding up of  
Formstage Services (Private) Limited t/a  
ZIMSPRAYS and the appointment of a liquidator

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE, 30<sup>th</sup> June 2004 and 6<sup>th</sup> October 2004

### **Opposed Application**

Mr *Chikono*, for the applicant  
Mr *Zhou*, for the respondent

BHUNU J: This is an application for the provisional liquidation of FORMSTAGE SERVICES (PVT) LTD t/a ZIMPRAYS with Mrs Eneda Mapfumo being appointed as provisional liquidator.

The applicant is the managing director and majority shareholder. The current allotment of shares as deposited to by the applicant at page 3 of his founding affidavit are as follows:-

1.	Applicant	25%
2.	Zuze	19%
3.	Page	19%
4.	Maponga	19%
5.	Mashonganyika	<u>18%</u>
	Total No. of Shares	<u>100%</u>

The applicant seeks the provisional liquidation of the company citing financial indiscipline on the part of his co-shareholders.

The graver-men of his complaint is that Zuze, Page and Mashonganyika have been unlawfully signing cheques and disbursing company funds to themselves without his knowledge as the managing director. The crux of the matter is that the 3 directors paid out dividends to themselves and the applicant without his approval and before an audit had been carried out.

Sometime in November 2002 the applicant raised his objections with his fellow directors and shareholders. They objected pointing out that the applicant was objecting to the dividends

because he had no need for the funds because he was sitting pretty from his previous earnings as a sales manager at A G Venture a company at which the applicant used to work.

The applicant's proposal that auditors be called in were turned down by the other directors on the pretext that it will be a waste of company funds.

He further alleges that in March 2003 dividends were paid out without his approval and in contravention of the tax laws. When he protested he was not paid his November commission.

The applicant has made numerous other complaints but the long and short of it all is alleged financial indiscipline and mismanagement of company funds and resources by his fellow directors. He is averse to his co-directors style of management.

Assuming that the applicant's allegations are true and correct, the tragedy is that although the applicant is the managing director and majority share holder he does not have a controlling shareholding.

Whereas his shareholding in the company is 25% that of his co-directors put together is 75%. He is against all his 4 co-directors and all his co-directors are against him.

Looked at from that angle his interests in the company are therefore in the minority. It has been said that in a democratic organization whenever the interests of the minority came into conflict with those of the majority, the interests of the minority must give way to the interests of the majority.

In this case we are not only looking at the interests of the directors and shareholders, we also need to consider the employees' interests coupled with those of the company's clients, customers and suppliers. The company's contribution to the fiscus in terms of revenue collection and the economic growth of the country as a whole.

The applicant is bitter that having formed the company and having invited all the other directors they are now running the company in an unethical manner much to his chagrin.

That might very well be so but one has to balance the applicant's competing interests against all the competing interests of all the other interest groups I have adverted to above. I have a particular soft spot for the employees and their dependants. Should their interests be sacrificed in order to assuage, the applicant's injured feelings? The answer should surely be in the negative.

Apart from the applicant's mere say so in paragraph 6 of his founding affidavit he has been unable to proffer any evidence tending to show that it is now impossible to carry on business. On the contrary the mere fact that dividends continue to be declared and that the

company is not bankrupt is evidence of the fact that business is still viable inspite of the alleged mismanagement and unethical conduct on the part of the applicant's co-directors.

Although the applicant alleges criminal conduct, none of the co-directors have been arrested or prosecuted for their alleged unlawful conduct.

I take the view that when things go wrong the solution does not lie in killing the hen that lays the golden eggs. I strongly believe that when things go wrong they must be put right.

The adage that "Mary in haste repents at leisure is apt." The applicant must not be in a hurry to kill the hen that lays the golden eggs upon which the applicant his co-directors and others who have nothing to do with this conflict are dependant.

The applicant being the managing director the burden falls squarely on his shoulders to put right whatever has gone wrong.

This application was brought in terms of section 206(g) of the Companies Act [Chapter 24:03]. That section confers a wide discretion on the court in determining whether or not to wind up a company. It provides that; "A company may be wound up if the court is of the opinion that it is just and equitable that the company should be wound up."

The circumstances in which the court may exercise its wide discretion are wide and varied, the door is by no means closed. The bottom line however is that at the end of the day the court must be satisfied that it is just and equitable that the company should be wound up. See *Tjosponie Boerdery (Pty) Ltd 1989 (4) SA31*.

Having said that I must venture to say that the test is subjective rather than objective in the sense that the decision is based on the opinion of the trial court and not the opinion of the proverbial reasonable by stander or any other court.

I have already made the valid point that in my opinion the balance of convenience, justice and equity militate against the winding up of the company. In my view it is certainly unjust and inequitable to wind up the company FORMSTAGE SERVICES 9PVT) LTD Trading as ZIMSPRAYS thereby prejudicing all those dependant on the company for their livelihood and economic well being.

The applicant in my opinion has two viable options. He can either endeavor to put things right in his capacity as managing director using all the legal means at his disposal or throw in the towel, sell his shares and opt out of the company.

The golden hen may be sick but it is still capable of laying some more golden eggs. What it needs is treatment rather than execution. If the applicant does not have the required

antidote in the sense that he has no solution to the problems besetting the company real or imagined he must gracefully opt out leaving others to take up the challenge without killing the company.

Generally speaking winding up a company like execution is an extraordinary measure which must not lightly be resorted to without first exhausting all the other available remedies. In this case as I have already demonstrated above, I am not convinced that the applicant has discharged the onus of establishing that there are no other viable remedies except to wind up the company.

That being the case, the application cannot succeed. It is accordingly ordered that the application for the provisional winding up of FORMSTAGE SERVICES (PVT) LTD T/A SIMSPRAYS be and is hereby dismissed with costs.

*Mhiribidi, Ngarava and Moyo*, the applicant's legal practitioners

*Honey and Blackenberg*, the respondent's legal practitioners