

UNITED METHODIST PUBLICATIONS AND
STATIONERS FOUNDATION TRUST (IN LIQUIDATION)

versus

GIVEMORE CHINGWEREWERE

and

PAULINE MANDIKUTSE

and

THOMAS MATAMBANADZO

and

PETTINA MASHAYAMOMBE

and

OLINDA MUKWINDIDZA

and

INNOCENT MACHECHE

and

DEPUTY SHERIFF OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE

TAGU J

HARARE, 12 February 2014

Opposed Application

F Ruzive, for the applicant

Mrs S Evans, for the respondents

TAGU J: The applicant is a department of the United Methodist Church Zimbabwe West Annual Conference” UMC”. The first, second, third, fourth, fifth and sixth respondents were employees of the applicant. The seventh respondent is the Deputy Sheriff of the High Court.

The Deputy Sheriff served the applicant with a notice of judicial Attachment on 31 January 2014. The removal of the property was scheduled to take place on 5 February 2014. On 6 February 2014 the applicant filed this Urgent Chamber Application. The application is for stay of execution pending an application for rescission of default judgment granted by this court on 17 January 2014.

The History of the matter is that the applicant terminated the employment of the respondents with immediate effect by letters dated 11th December 2012. The respondents were laid off without their wages and terminal benefits. The matter went before an arbitrator and an arbitral award was granted in favour of the respondents on 4 July 2013. It was on 17 January 2014 that a default judgment was then issued by this court which judgment is still pending and for which the respondents are now seeking to execute.

Meanwhile, after the arbitral award was granted on 4 July 2013 the applicant made a chamber application before this court on 11 December 2013 for an order placing the applicant under liquidation. This was a voluntary action by the applicant. The order granted read as follows:-

“IT IS ORDERED THAT:

1. The applicant, United Methodist Publications and Stationers Foundations Trust is provisionally wound up, pending the granting of an order referred to in paragraph 3 or the discharge of this order.
2. Subject to Subsection (1) of Section 274 of the Companies Act (Chapter 24:03) the Master shall appoint Rungano Jekeso Mbire of Pace Chartered Accountants as provisional liquidator of the Applicant with the powers set out in paragraph (a) and (g) of Subsection (2) of Section 221 of the Companies Act (Chapter 24:03).
3. Any interested party may appear before this Court sitting at Harare on the 14th of May 2014 at 10.00 am, to show cause why a final order should not be made placing the applicant in liquidation and ordering that the costs of these proceedings shall be the costs of liquidation.
4. Pending the return day, this order shall operate as an order of winding up.
5. This order shall be published once in the Government Gazette and once in The Herald Newspaper Publication shall be in the form annexed to the order.
6. Any person intending to oppose or support the application on the return day of this order shall;
 - 6.1 Give due notice to the Applicant’s Legal Practitioners, Nyawo Ruzive Attorneys and,
 - 6.2 Serve on the Applicant at the address specified in paragraph 6.1 of the order, a copy of an affidavit which it files with the Registrar of the High Court.”

This application is opposed by the respondents.

In the founding affidavit the applicant avers among other things that the respondents have seriously entangled themselves because of glaring procedural and substantive missteps. It argued that the applicant was put into provisional liquidation on 11 December 2013 by this Honourable Court. By operation of provisions s 213 of the Companies Act [*Cap 24.03*] no proceedings shall be proceeded with or against the company except with the leave of the court. It further argued that s 213(b) of the Companies Act further provides that “any attachment or execution put in force against the assets of the company after commencement of the winding up shall be void”. And that in any event, enforcement of the Arbitral Award in question would be contrary to public policy.

The applicant now seeks for an order in the following terms:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The seizure and attachment of the 2nd Applicant’s property be and is hereby set aside.
2. If such attachment and sale in execution eviction would have already been fully or partially effected, the sale be cancelled and registration of rights and interests in the property described above shall be restored to the Applicant.
3. The costs hereof shall be in the cause.

INTERIM RELIEF GRANTED

Pending the determination of this matter applicant is hereby granted the following relief.

1. The seizure and attachment of the applicant’s property be and is hereby stayed

Pending,

- 1.1 the finalisation of application for rescission of default judgment proceedings to be issued by the Applicant”

The respondents raised a number of issues in opposing this application. Chief among them were that this matter is not urgent. They argued that the removal was to take place on 5 February 2014 but the applicant waited until after the said date and then approaches the court on an urgent basis a day after removal. That applicant was aware that there was a topical pending matter from 2012 involving non-payment of wages and terminal benefits of employees and at any time it would be a day of reckoning. Now that the day has come

applicant wishes to pretend to the court that the matter is indeed urgent. They said the urgency is self-created by the applicant. They argued further that this application is an abuse of the court process. It is a desperate attempt to stop legitimate execution because it does not wish to pay its workers and would want this Honourable court to assist it in evading its obligations. They said the liquidation process is a gimmick and a desperate action of avoiding and stopping them from enforcing their rights. The respondents argued that to date the applicant has not filed an application for rescission of the said judgment to demonstrate its seriousness. The interpleader proceedings have not been served on them. In any case the applicant was duly barred and it has to first seek for the removal of the bar for it to be heard. Hence applicant has no leg to stand on.

As to the issue of s 323(b) of the Companies Act it provides that no unregistered association shall be wound up under this Act voluntarily. They argued further that the applicant wished to create a false status as to the legal position of the applicant. According to them the United Methodist Church and the applicant are one and the same thing. The applicant wishes to liquidate a department leaving the church and its other departments functioning when it is controlled and governed by the church which is still functioning and capable of meeting its obligations. It is their contention that it was the church which was paying the respondents. Hence they submitted that this application be dismissed. The court was referred to the case of *Ellingbarn Trading (Private) Limited v Assistant Master of High Court and People's Own Savings Bank* HB-82-13.

Having heard submissions from both counsels and perusing the papers filed I made the following observations.

1. The applicant applied to be placed under liquidation only after an arbitral award was granted against them. The application to place applicant under liquidation was done by the applicant voluntarily without advising all the interested parties. Applicant is actually a department of the United Methodist Church which is fully functional. In normal circumstances the provisions of section 213 of the Companies Act would apply. Having considered the ruling and reasoning in the case of *ELLINGBARN TRADING* supra, the decision to place applicant under liquidation was done solely for the purpose of frustrating the respondents so that they cannot execute their judgment. It was not a bona fide decision. On that basis this application cannot succeed.
2. Even if I am wrong on the first point above as of now the applicant has not yet filed its papers with this court for rescission of judgment. It just remains their wish which they may not do once they obtained a judgment staying execution of property.

According to their draft order they are praying for an interim order pending finalisation of application for rescission of default judgment proceedings to be issued by the applicant (underlining is my emphasis). As correctly stated by respondents even interpleader proceedings have not been served on the respondents. This shows lack of seriousness and sincerity on the part of the applicant.

For the above reasons the application is dismissed with costs on a legal practitioner – client scale.

Nyawo, Ruzive applicant's legal practitioners

Mabuye Zvarevashe, 1st, 2nd, 3rd, 4th, 5th & 6th respondents' legal practitioners