

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ZIMBABWE

**Judicial Management, Liquidation and
Curatorship Processes Seminar**

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JUDICIAL MANAGEMENT

Introduction

- Judicial management is provided for as an alternative to winding up in terms of Sections 299 – 314 of the **Companies Act** (Chapter 24:03). What is judicial management? The term is not defined in the **Companies Act**. However, what can be deduced from the various provisions of the **Companies Act** is that the concept means the management of a company by a person appointed by the Master of the High Court in terms of the provisions of the **Companies Act**, subject to the supervision of the High Court.

When is judicial management appropriate?

- The object of a judicial management order is to avoid the drastic remedy of winding up when a company is in financial difficulties due to mismanagement or some other cause, but there is a reasonable probability that under more careful controlled management it will surmount its difficulties. Section 300 of the **Companies Act**.
- The court enjoys a wide discretion in deciding whether or not to issue a provisional judicial management order. In exercising the discretion the court will be reluctant to grant an order from which shareholders seek to benefit by keeping creditors waiting a long time for payment.

Effect of judicial management order

- Persons vested in the management of the company's affairs shall from the date of the judicial management order be divested thereof. Section 301 of the **Companies Act**.
- Upon the granting of a provisional judicial management order all the property of the company concerned shall be in the custody of the Master until a provisional judicial manager has been appointed and has assumed office. Section 302 of the **Companies Act**.
- A judicial management order usually provides a moratorium in regard to the company's debts. The order may provide for the staying of all actions, proceedings, writs, summonses and other proceedings against the company.

Who may apply for a judicial management order?

- The company itself, a creditor, a member (shareholder) or certain officials may apply to the High Court for a provisional order placing a company under judicial management. (Direct application.)
- The High Court may also grant a provisional judicial management order on an application being made to it for a winding up order. Section 299 of the **Companies Act**.

Provisional judicial management order

- Section 301 requires a provisional judicial management order to fix the date of the return day, not less than 60 days ahead.
- The provisional order also specifies other matters that must or maybe included in the order. It may confer upon the provisional judicial manager the power to raise money in any way without the authority of shareholders, as the court may consider necessary.

The provisional judicial manager

- The provisional judicial manager must assume the management of the company and recover any take possession of all the assets of the company. Section 303 of the **Companies Act**.
- The provisional judicial manager is required to obtain the leave of the court before selling or otherwise disposing of any of the company's assets except in the ordinary course of the company's business. Section 307 of the **Companies Act**.
- In performing his duties he must be impartial. **Alison v Nicholson** 1969 RLR 446.

The provisional judicial manager (continued)

- In terms of Section 303(c) the provisional judicial manager shall prepare and lay before separate meetings of creditors, shareholders and debenture holders, if any, to be convened by the Master a report containing:
 - (a) an account of the general state of the affairs of the company;
 - (b) a statement of the reasons why the company is unable to pay its debts;
 - (c) a statement of the assets and liabilities of the company;
 - (d) a complete list of the creditors of the company;
 - (e) particulars as to any source from which money has or is to be raised for purposes of carrying on the business of the company; and
 - (f) the considered opinion of the provisional judicial manager as to the prospects of the company becoming a successful concern.

The provisional judicial manager (continued)

- The purpose of the mentioned meetings is to consider the report and decide whether a final judicial management order is desirable, to nominate a final judicial manager and at the creditors' meeting to prove creditors' claims.
- The provisional judicial manager shall remain in office until the return day.

Return day of provisional judicial management order

- The return day as fixed by the provisional judicial management order, or as extended by the court, is the occasion for the court to decide whether to grant a final order, discharge the provisional order or make any other order that it thinks just.
- It reaches its decision after considering:
 - (a) the opinion and wishes of the creditors and members of the company;
 - (b) the report of the provisional judicial manager;
 - (c) the number of creditors who did not prove creditors at the first meeting of creditors and the amounts and nature of their claims;
 - (d) the report of the Master; and
 - (e) the report of the Registrar.

Section 305 of the **Companies Act**.

Return day of provisional judicial management order (continued)

- A final order will be granted only if it appears to the court that there is a reasonable probability that the company will thereby be enabled to become a successful concern and that it is just and equitable to grant such an order.

Conduct of judicial management

- A final judicial management order transfers the management of the company from the provisional to the final judicial manager (who may be the same person).
- The final order may also give the final judicial manager directions, including the power to raise money in any way.
- The order may be varied by the court at any time.
- The final judicial manager's duties, which cannot be conveniently summarized, are set out in detail in Sections 306 and 307 of the **Companies Act**.

WINDING UP

Introduction

- Winding up is the process by which a company's existence is brought to an end. This may take the form of either winding up by the court or voluntary winding up. While the process is continuing the company is described as being in liquidation. Winding up is provided for in Part V of the **Companies Act**.

Grounds for winding up by the court

- Section 206 of the **Companies Act** sets out 7 grounds upon which a company may be wound up by the court. The grounds are:
 - (a) If the company has by special resolution resolved that the company be wound by the court.
 - (b) If default is made in lodging the statutory report or in holding the statutory meeting.
 - (c) If the company does not commence its business within a year from its incorporation or suspends its business for a whole year.
 - (d) If the company ceases to have any members.
 - (e) If 75% of the paid-up share capital of the company has been lost or has become useless for the business of the company.
 - (f) If the company is unable to pay its debts.
 - (g) If the court is of the opinion that it is just and equitable that the company should be wound up.

Grounds for winding up by the court (continued)

- Whichever ground is relied on, the court is not obliged to issue a winding up order but will exercise its discretion, taking into account the wishes of creditors and contributories.

Who may apply for winding up

- Section 207(1) provides that an application for winding up by the court may be made by the company, a creditor, a contributory or, as a result of an inspector's report under Section 162, the Minister of Justice, Legal and Parliamentary Affairs.
- A contributory is defined in Section 202 as a person liable to contribute the assets of a company in winding up. This includes shareholders whose shares are fully paid up.

Procedure

- The applicant must proceed by way of application to the High Court (Section 207), which must comply with the **Companies (Winding Up) Rules**, SI 841/1972. One of the requirements of Rule 5 of SI 841/1972 is that the application must be served on the company if it is not itself the applicant.
- On hearing the application the court may exercise any of the wide powers conferred on it by Section 208, but if satisfied it will normally issue a provisional order for winding up and for the appointment of a provisional liquidator, but if nobody could be prejudiced it may issue a final order.

Effect of winding up order

- The Registrar of the High Court is required by Section 214 to transmit every winding up order to the Chief Registrar of Companies.
- The immediate effect of a winding up order is to freeze the company's affairs in a number of respects:
 - (a) Legal proceedings, attachments and executions are stayed. (Section 213(a) and (b)).
 - (b) Dispositions of property, share transfers and alterations and the status of members may no longer be made, except with the permission of the court.
 - (c) The company's property is deemed to be in the control of the Master until a provisional liquidator is appointed.
 - (d) A statement of the company's affairs must be submitted to the Master who may report to the court on the conduct of the company's affairs.
 - (e) The powers and duties of the directors cease.

The Liquidator

- If a provisional winding up order is made the court will appoint a provisional liquidator.
- When a final winding up order has been made the Master calls for meetings of creditors and contributories to elect a liquidator. Section 219.
- The liquidator should be independent.
- Before taking up his duties the liquidator must give security to the satisfaction of the Master. Section 274.
- The Master or any person having an interest in the winding up may apply to court for a declaration that the liquidator or proposed liquidator is disqualified or for an order removing him for some good cause. Section 273.

Powers and duties of liquidator

- The liquidator's first duty is to recover and take into possession all the company's property (Section 276(2)), enlisting the court's aid if necessary (Section 229) and to open a bank account (Section 221).
- Section 221 sets out the liquidator's powers, dividing them into those which he may exercise without further authority, those which require either the authority of a joint meeting of creditors and contributories or the leave of the court, and those which require the leave of the court.
- The court will not give a provisional liquidator power to raise money on the security of the assets of the company (Section 221(3)) without the approval of creditors and in general will be guided by the views of creditors and the probable benefit to the company's estate.
- In carrying out his duties the liquidator must take into account any directions he may be given by meetings of creditors and contributories (Section 222) and he acts under the general supervision of the Master (Section 223).

Creditors and Contributories

- Creditors are summoned to a first meeting by the Master for the proof of their claims in accordance with Section 220 and for the election of a liquidator (Section 219(1)(a)).
- Thereafter the liquidator must call a meeting to receive his report (Section 277) and may call such other meetings as are necessary for the proof of further claims (Section 220) or for obtaining directions (Sections 221 and 222).
- Creditors votes are counted by value. Section 289.
- Contributories are also summoned by the Master for the first meeting for the election of a liquidator (Section 219(1)(b)) and by the liquidator to a meeting to receive his report (Section 277).
- In convening and conducting all meetings the liquidator must follow the laid down procedure by the **Companies (Winding Up) Rules**, SI 841/1972.

Company unable to pay its debts

- One of the grounds for winding up by the court is that the company is unable to pay its debts and Section 205 sets out various circumstances in which this inability is deemed to exist.
- A company shall be deemed unable to pay its debts if:
 - (a) a demand to pay its debts is served on the company at its registered office and if the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
 - (b) a return of service is rendered by the Sheriff or by the Messenger of Court with an endorsement that there was an attempt to attach the company's assets into execution and that no assets could be found to satisfy the debt or that the assets found were insufficient to do so; and
 - (c) it is proved to the satisfaction of the court that the company is unable to pay its debts.

The process of liquidation

- The liquidator ascertains the total of the company's liabilities from the proofs of creditors' claims.
- Sell the company's assets with the authority of a joint meeting of creditors and contributories or with the leave of the court, keeping a proper account of all transactions.
- After the sale of the assets he then calculates the shortfall and if there are any contributories liable to contribute to this shortfall under Section 201 to call for the contributories to pay.
- If there is still a shortfall the available funds are applied in the same order or preference as in insolvency.

The Liquidator's account

- Within 6 months, unless he receives an extension of time from the Master, the liquidator must frame his account and plan of distribution or contribution and lay it before the Master, in the form of an interim account.
- The account is advertised and lies for inspection (Section 281) so that any person interested in the winding up may lodge an objection with the Master, who may order the account to be amended as a result of an objection or of his own motion.
- Any objections having been disposed of, the Master confirms the account, his confirmation having the effect of a final sentence. (Section 283).

Dissolution of the company

- The liquidator must advertise the confirmation of his account in the Government Gazette and distribute in accordance with the account.
- Unclaimed dividends are paid into the Guardian's Fund (Section 285), from which they can be withdrawn by persons entitled to them (Section 292).
- The liquidator must then deliver his books and papers to the Master (Section 293) and the Master applies to the court for the dissolution of the company (Section 236).
- Any remaining property of the company vests in the State. Section 321.
- Any legal proceedings instituted by the company which are still pending will be dismissed.

Voluntary winding up

- This may take the form of either a members' or creditors' voluntary winding up. The method of initiating a voluntary winding up is by way of special resolution.
- Before members voluntarily propose to wind up a company the directors shall:
 - (a) Furnish security to the Master for the payment of all company debts within a period not exceeding 12 months from the commencement of the winding up. Section 246(1).
 - (b) Or furnish the Master with a sworn statement supported by a certificate from the auditors of the company, which states that the company has no liabilities.

Voluntary winding up (continued)

- For the resolution to take effect, the following procedures must have been undertaken: -
 - (a) Give notice to the Registrar of Labour Relations and to the Company's Workers' Committee/Company Employees at least 4 weeks before passing the resolution. (Section 243(2)(a) and (b) of the **Companies Act**.)
 - (b) Once the resolution has been passed, written notices should be given to the Master and the Registrar of Companies within two weeks.
 - (c) Within one month of passing the resolution: - Section 243(3)(b) of the **Companies Act**.
 - (i) Publish notice of the resolution in the Gazette.

Voluntary winding up (continued)

- (ii) Give notice to the Registrar of Deeds and Companies through lodging form number CR 11 in duplicate.
 - (iii) Give notice to the Secretary of Mines where the company holds rights to minerals.
- On passing the resolution to wind up the company, the members shall appoint one or more liquidators for the purpose of winding up the affairs of and distributing the assets of the company.
- A members' voluntary winding up shall be deemed to have commenced at the time of passing the resolution for voluntary winding up (Section 244 of the **Companies Act**) by the members.
- In practice, members' voluntary winding up is used for solvent companies.

Voluntary winding up (continued)

- A creditors' voluntary winding up is also initiated by members of the company. Members will cause separate meetings for members and for creditors to be held on the same day or the following day. The purpose of these meetings will be to propose a resolution for the voluntary winding up of the company.
- At these meetings, the directors of the company table a full statement of the affairs of the company, a list of creditors and the estimated amount of their claims.
- At these separate meetings, a resolution to voluntarily wind up the company will be passed and a liquidator appointed for the purposes of winding up the affairs and distribution of the assets of the company. For the resolution to take effect the same procedures noted above in respect of a members' voluntary winding up should be followed.
- In practice, a creditors' voluntary winding up is used for insolvent companies.
- A creditors' voluntary winding up shall be deemed to have commenced at the date the resolution for voluntary winding up is passed by the creditors.

Offences connected with winding up or judicial management

- Winding up and judicial management both lay the affairs of the company open for inspection by an independent person, the liquidator or judicial manager. If this inspection reveals irregularities and criminal conduct it is the duty of the liquidator/judicial manager to lay the facts before the Prosecutor General.
- A prosecution under Section 318 for the fraudulent conduct of the company's business may be instituted or under Section 316 for failing to attend meetings or under Section 317 for any one of a number of dishonest acts in the course of winding up or judicial management of a company unable to pay its debts.
- In addition Section 315 entitles the Master, liquidator, judicial manager, a creditor or contributory to apply to court for an inquiry into the conduct of a promoter, officer, liquidator or judicial manager and to order the payment of compensation to the company.

CURATORSHIP

Introduction

- Curatorship and the winding up of banking institutions is provided for under Part X of the **Banking Act** (Chapter 24:20). Curatorship incorporates many of the fundamental provisions of judicial management.

Placing of banking institutions under curatorship

- Where –
 - (a) The Reserve Bank considers that a banking institution is in an unsound financial condition and is not operating in accordance with sound administrative and accounting practices and procedures, adhering to proper risk management policies; or
 - (b) A banking institution has failed to comply with the minimum financial requirements prescribed in terms of the **Banking Act** and the Reserve Bank considers that it is unlikely to comply with them unless it is placed in curatorship;

the Reserve Bank may issue a written direction to the institution placing same under the management of a curator for such a period, whether definite or indefinite, as in the Reserve Bank's opinion will permit the institution's financial position to be remedied or resolved. (Section 53(1) of the **Banking Act**).

Effect of placing banking institutions under curatorship

- The placing of a banking institution under curatorship shall have the effect of suspending the powers of every director, officer and shareholder of the banking institution concerned, except to the extent that the curator may permit them to exercise their powers. (Section 54(1).)
- With effect from the date of curatorship:
 - (a) All legal proceedings and the execution of all writs, summonses, and other legal process against the banking institution concerned shall be stayed and not to be instituted or proceeded with unless the High Court has granted leave; and
 - (b) The operation of set off in respect of any amount owing by a creditor to the banking institution concerned shall be suspended.

(Section 54(2)).

Duties and powers of curator

- The duties and powers of the curator are set out in Section 55 of the **Banking Act**. It is not possible to explore all the duties and powers provided thereunder.
- The duties and powers include the following:
 - (a) Taking over and assuming the management of the banking institution concerned;
 - (b) Managing the banking institution concerned in such manner as he considers prudent and most likely to promote the interests of the institution and creditors of the institution;

Duties and powers of curator (Continued)

(c) To examine the affairs and transactions of the banking institution concerned before it was placed under curatorship in order to ascertain whether any past or present director, officer or employee of the institution -

(i) has contravened any provision of the **Banking Act**;

(ii) has committed or appears to have committed any offence; or

(ii) is or appears to be personally liable to pay damages or compensation to the institution or is personally liable for any of the institution's liabilities;

and , within 3 months after the institution was placed under curatorship, submit to the Reserve Bank a report containing full particulars of any such contravention, offence or liability.

- The curator shall from time to time, in such manner as he thinks fit, convene meetings of creditors of the banking institution concerned for the purpose of establishing the nature and extent of the institution's indebtedness to them and consulting them on decisions taken by him in the course of managing the institution's affairs, to the extent that the creditors' interests may be affected by those decisions.

Freezing of deposits and investments

- If, when issuing a direction placing a banking institution under curatorship, the Reserve Bank considers such a course necessary in order to –
 - (a) preserve the financial standing of the institution; or
 - (b) prevent an uncontrolled withdrawal or removal of funds or assets from the institution;

the Reserve Bank may, in the direction, declare that for a period not exceeding one year all or any of the amounts deposited with or invested in the institution are frozen.

- Where the direction placing a banking institution under curatorship does not provide for the freezing of deposits and investments, whenever the curator considers such a course necessary the curator may freeze, for a period not exceeding one year, all or any of the amounts deposited with or invested in the banking institution. The curator shall consult the Reserve Bank before freezing any amounts.

Special provisions relating to winding up or judicial management of banking institutions

- Notwithstanding anything to the contrary in the **Insolvency Act** (Chapter 6:04) or the **Companies Act** –
 - (a) The Reserve Bank shall have the right to apply to the High Court for –
 - (i) the winding up of any banking institution; or
 - (ii) an order placing any banking institution under judicial management or provisional judicial management in terms of the **Companies Act**.
 - (b) No person other than a person recommended by the Reserve Bank shall be appointed as provisional liquidator, provisional judicial manager, liquidator or judicial manager of a banking institution.