IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CASE NO. 1382/2014

HELD AT MBABANE

In the matter between:-

HELEN ELIZABETH BOTHA (BORN ELLIOT)	**Petitioner**
In re: HELEN ELIZABETH BOTHA (BORN ELLIOT)	**Petitioner**
And	
COMPUTER SOLUTIONS (SWAZILAND) PTY LTD	**1st Respondent**
ANDRE CHRISTO BOTHA	**2nd Respondent**
MASTER OF THE HIGH COURT	**3rd Respondent**

RULING ON POINTS OF LAW

Neutral citation:	*Helen Elizabeth Botha v Computer Solutions & Others (1382/2014) [2015] SZHC 189 (27 October 2015)*
Coram:	FAKUDZE, J
Heard:	22 October, 2015
Delivered:	27 October, 2015

Summary: ***Company law – A party seeking the winding up of a company in terms of Section 287 (e) of the Companies Act, 2009, must comply with the provisions of Section 289 (2), (3) and (4).***

[1] Sometime in October, 2014, the Petitioner filed an Ex parte application calling forth for the winding up of 1st Respondent by this Court in terms of Section 287 (e) of the Companies Act, 2009. In her Notice of Motion, the Petitioner prayed for the provisional winding up of 1st Respondent, the appointment of a liquidator and calling upon all interested persons to show, on a date set by the Court, cause why 1st Respondent should not be finally wound up. According to the Petitioner, the basis for the winding up of 1st Respondent is that there is an unhealthy and an unworkable relationship between the Shareholders and Directors of 1st Respondent. The Petitioner alleges that there are no company meetings, no returns have been filed, the company ceased to be in business and is therefore dormant and the company is no longer meeting its statutory obligations. In short, there is a deadlock between the Petitioner and 2nd Respondent, the two being the owners of 1st Respondent and thus rendering the activities of 1st Respondent a nullity. A *rule nisi* was issued by the High Court and First and Second Respondent filed a Notice of Intention to Oppose. The *rule nisi* was, by agreement between the parties, discharged.

POINTS OF LAW

[2] After filing the Notice of Intention to Oppose the Petition, 1st and 2nd Respondents filed an Answering affidavit, in which affidavit points of law were raised. The points of law were raised in paragraphs 4 and 5 of the Answering Affidavit where the Respondents stated that –

> (**4) *The Application is fatally defective in that it has failed to comply with the requirements of the very Act it purports to be based on. I am advised and verily believe that even the Interim Order should not have been granted given the circumstances of the application. It is evident that the Applicant has not complied with the peremptory requirements of Section 289 of the Companies Act No 8 of 2009.***

(5) The Petitioner has not obtained, alternatively, attached to its papers, a certificate by the MASTER OF THE HIGH COURT to the effect that sufficient security has been given for the payment of all fees and charges necessary for the winding up proceedings. This is in breach of Section 289 (2) of the COMPANIES ACT. This is fatal to the application."

[3] As indicated earlier, In addition to raising the points of law, 2nd Respondents answered all the allegations contained in the Petition. The Petitioner replied and had this to say to the points of law raised by 2nd Respondent –

"4.1 Contents hereof are strictly denied of which Second Respondent is put to strict proof thereof.

4.2 The basis upon which the present Petition is founded is in terms of Section 287 (e) as per paragraph 21 of the Petition.

4.3 I am advised and verily believe that it is not peremptory that the Master's Certificate be obtained in terms of Section 287 (e) of the Companies Act of 2009. The present winding up proceedings are not in terms of Section 289 of the Companies Act as per the aforesaid section; of which Second Respondent is put to strict proof thereof.

4.4 Furthermore I am advised and verily believe that it is not necessary to file the Master's Certificate stating that the Company has sufficient assets for payment of all fees and charges for payment of winding up the company in terms of Section 287 (e) as aforesaid.

4.5 It is material to point out that the Company has sufficient funds in the sum of E1.8 Million to satisfy the charges and fees referred to above including Creditor's claim."

SCOPE OF ENQUIRY

[4] When the matter appeared before this Court for argument, the Parties had filed Heads of Argument and list of authorities both on the points of law and on the merits. This Court is very grateful for this. It was agreed that the points of law be first dealt with and a Ruling on them be made by this Honorable Court. 1st and 2nd Respondent's Counsel raised another point of law and that is the form that was used by the Petitioner to bring the matter

before this Court. Counsel argued that the Companies Act, 1912 specifically provides for one to approach the Court for a winding up of a Company by means of a Petition whereas the 2009 Act provides for the use of Motion proceedings. This has to do with form as opposed to substance.

In **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd/TA Sir Motors Appeal Case. 23/2006 Tebbut JA** stated in page 23 paragraph 39 that

> ***"The learned Judge a quo with respect, also appears to have overlooked the current trend in matters of this sort, which is now well recognized and firmly established, viz, not to allow technical objections to less than perfect procedural aspects to interfere in the expeditious and, if possible, inexpensive decisions on their real merits."***

This Court therefore concludes that this point of law should be viewed in the light of Shell Oil case and I therefore dismiss this point *in limine*.

I now go on to deal with the main point *in limine* and that is the compliance or non compliance with Section 289 of the Companies Act, 2009 in an application for the winding up of a Company by the Court in terms of Section 287 (e) of the Act. All that this Court is called upon to determine is whether or not a Company seeking to be wound up on the basis of Section 287 (e) of the Companies Act, 2009 need to comply with Section 289 especially if the Company is in a sound financial position to pay its Creditors and satisfy all the fees and charges relating to the winding up.

[5] Before this Court undertakes this task, the provisions that are in dispute are worth mentioning.

Section 287 reads thus -

287. "Circumstances in which company may be wound up by court.

A company may be wound up by the court if—

(a) **The company has by special resolution resolved that it would be wound up by the court;**

(b) **The company has not commenced its business within a year from its incorporation or has suspended its business for a whole year;**

(c) **More than seventy-five percent of the issued share capital of the company has been lost or has become useless for the business of the company;**

(d) **The company is unable to pay its debts;**

(e) **It appears to the court that it is just and equitable that the company should be wound up."**

Section 289 reads thus –

"Application for winding-up of company."

289. (1) An application to the court for the winding-up of a company may, subject to this section, be made—

(*a*) By the company;

(*b*) By one or more of its creditors (including contingent or prospective creditors);

(c) By one or more of its members or any other person referred to in section 97(3) irrespective of whether his name has been included in the register of members or not;

(d) Jointly by any or all of the parties mentioned in paragraphs (*a*), (*b*) and (*c*);

(e) In the case of any company being wound up voluntarily, by the Master or any creditor or member of that company;

(f) In the case of the discharge of a provisional judicial management order under Section 366(3) or 370(2) by the provisional judicial manager or the company; or

(g) In the case of a cancellation of a judicial management order under Section 379, by the judicial manager or the court.

(2) Every application to the court referred to in subsection (1), except an application by the Master in terms of paragraph (*e*) of that subsection shall be accompanied by a certificate by the Master, issued not more than ten days before the date upon which the application is issued, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed by the court and has furnished security as provided in section 337(2).

(3) Before the application for the winding-up of a company is presented to the court, a copy of the application and of every affidavit confirming the facts stated therein shall be lodged with the Master.

(4) The Master may report to the court any facts ascertained by him which appear to him to be pertinent to the hearing of the application and shall transmit a copy of that report to the applicant or his agent and to the company."

RULES OF INTERPRETATION

[5] The Rules of statutory interpretation will help in dealing with a matter that this Court is called upon to decide**.** There are basically three rules I will use for our purposes. The first rule is that every word in a legislation is very important. Christo Botha on "Statutory Interpretation, fourth edition, says in page 69-

> ***"The principle that a meaning must be assigned to every word derives from the rule that words are understood according to their ordinary meaning. Strictly speaking, This is a principle which applies when any text is read. Legislation should be interpreted in such a way that no word or sentence is regarded as redundant or superfluous."***

The second rule is that of contextual use of the words. Christo Botha describes it at page 59 as –

> ***"The method which is concerned with the clarification of the meaning of a particular legislative provision in relation to the context as a whole. This is also known as a holistic approach, and refers to the principle that words, phrases and provisions cannot be read in isolation."***

The third rule that is worth considering is the use of headings to chapters and sections. Christo Botha, *supra*, has this to say in page 80 on this rule –

> ***"Headings to chapters or sections may be regarded as introductions to those chapters or sections. Within the framework of text – in – text context headings should be used to determine the purpose of the legislation. In the past the courts held the literal view that headings may be used by the courts to establish the purpose of legislation only when the rest of the provision is not clear."***

[6] Respondent's Counsel has also raised another rule of interpretation which is the sequencing of the Sections. Based on this rule, Counsel contends that

Section 287 tells us the circumstances in which a company may be wound up by a Court. The circumstances include paragraph (e) which stipulates that a Court may wind up a company " if it appears to the Court that it is just and equitable that the company should be wound up." Counsel further avers that Section 288 deals with when a company is deemed unable to pay its debts in terms of Section 287 (d) and Section 289 determines the application procedure. Counsel for the Respondent further avers that a proper reading of Sections 287 and 289 is that whereas 287 states the "when" a company may be wound up by the Court, Section 289 states "who" can make an application for a company to be wound up. Once you determine the "who" that "who" is bound to comply with Sub-Section (3) with the exception of the Master.

Petitioner's Counsel takes the view that the focus should not be on the formalities, but should be on whether the allegations made by the Petitioner have any substance or not. Based on that consideration, the Court should invoke Section 287 (e) without taking into account the provisions of Section 289, particularly the need for the Master's certificate. Counsel for the Petitioner has referred this Court to the case of Ivan James Groening v Stealth Security (Pty) Ltd and 3 others (400/2013) SZHC as the authority for His proposition.

Counsel quotes the words of His Lordship Justice MCB Maphalala, as he then was, who held as follows –

> ***"It is incumbent upon the petitioner to establish either that the company is unable to pay its debts or that it is just and equitable that the company should be wound up."***

With the greatest of respects to Counsel for the Petitioner, the judgment by His Lordship addresses the merits of the Petition and not the points of law that were raised by Counsel for the Respondents. It cannot therefore assist Counsel in deciding the issue of the points in *limine* raised by the Respondents.

COURT'S RULING

[7] Having read the court papers and considered the arguments by both Counsel, this Court holds the view that the points in *limine* raised by 2nd Respondent have merit. The points are substantive in nature because they have to do with an Act of Parliament. Based on the rules of interpretation referred to earlier in this Ruling, the words that have been used in the Sections are clear and

straight forward. They should be interpreted as they are. The headings to the Sections are equally informative. The heading to Section 287 says "Circumstances in which company may be wound up by Court." Indeed, Section 287 tells us when the Court may wind up a company. It is by the company's special resolution; when the company has not commenced business within one year of incorporation or has suspended business for a whole year; when more than seventy five percent of the issued share capital has been lost or has become useless for the business of the company; the company is unable to pay its debts; and it appears to the Court that it is just and equitable that the company be wound up.

[8] The heading to Section 289 says "Application for winding up of Company." The opening words to Sub section (1) are clear and explicit when they say "An application to the Court for the winding up of a company may, subject to this section, be made….." They describe persons who qualify to be applicants which are the "who." This Section goes on to list an application by the company itself; by one or more of its creditors; by one or more of its members; jointly or severally by any of the parties mentioned earlier in (a), (b) or (c); in the case of a company being wound up voluntarily by the Master etc……." This means that before the Court decides the "when" in Section 287 it must decide the "who" in Section 289. The principle of contextual interpretation also come in. The trap Petition fell into is that she read Section 287 in isolation.

[9] The Petitioner's position is further worsened by the fact that in paragraphs 19 and 21 of the Petition, the Petitioner confirms what 2nd Respondent is saying when she avers that –

> "**19. It is the Petitioner's humble belief that as a Director and shareholder of the Company, the Petitioner has authority in terms of Section 289 (c) of the Companies Act, 2009, to bring the present Application before the above Honorable Court.**
>
> **21. It is also the humble view of the Petitioner that in view of the aforesaid circumstances, the Company be wound in terms of Section 287 (e) of the Companies Act, 2009."**

The circumstances referred to in paragraph 21 are dealt with by the Petitioner in paragraph 20 of the Petition.

It is the Court's considered view that a person who makes an Application for the winding up of a company cannot escape the peremptory provisions of Sub – sections (2), (3) and (4) of Section 289. The only person exempted from these Sub – sections is the Master. Another point worth considering in this case is if we were to conclude that there is no need for a Company that purports to be financially liquid to comply with Section 289 (2), how would the Court be fully informed about the company so as to enable the Court to come to a just and equitable decision? In the present Application, Petitioner alleges that the Company has assets in the form of investment in Unit Trusts. 2nd Respondent disputes that and claims that the purported investment belongs to Him. He loaned 1st Respondent. The wisdom of the Legislature comes in handy in such matters because the Master does a thorough investigation into the affairs of the company and the findings by the Master are submitted to the Court for its consideration.

[10] Taking into account all that has been said above, this Court upholds the point of law raised by 2nd Respondent that there should have been full compliance with the provisions of Section 289. The Petitioner is ordered to pay costs at an ordinary scale.

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M.R. FAKUDZE

JUDGE OF THE HIGH COURT

Petitioner:	T. N. Nsibande
1st and 2nd Respondents:	S. V. Mdladla