



**IN THE HIGH COURT OF SWAZILAND
RULING**

HELD AT MBABANE

CASE NO. 1527/19

In the matter between

AFRICAN ALLIANCE SWAZILAND UMNOTFO FUND

First Respondent

Represented by NEDBANK (SWAZILAND) LIMITED

Second Respondent

VS

MATATA GROUP (PTY) LTD

Heard : 01 November 2019

Delivered : 08 November 2019

Neutral Citation: African Alliance Swaziland Umnnotfo Fund Represented by NEDBANK (SWAZILAND) LIMITED 1527/2019 [2019] SZHC 209 (08 NOVEMBER 2019)

- [1] *Civil Law – Company Law – Winding of Company on ground that it is unable to pay its debts. Application by one of its Creditors in terms of Section 289 of Act 8 of 2009.*
- [2] *Company Law – Act 8 of 2009 – Winding-up of company on application by one of its Creditors – applicant praying for Court Order appointing a Provisional liquidator based on Section 289 (2) of the Act. At a glance, Section 289 (2) permits Court to appoint such liquidator. However, close analysis of the total scheme and arrangement of the Act shows that the power to appoint a liquidator rests with the Master and not the Court. Two infelicities noted in Section 289 (2) of the Act.*

- [1] The respondent herein is being wound-up the instance or on the application of the applicant who is one of its creditors. The ground for such winding up is that the respondent is unable to pay or honour its debts as envisaged or described under section 288 of the Companies Act 8 of 2009 (hereinafter referred to as the Act).
- [2] In its notice of Motion, the applicant prays, inter alia, for an order for the appointment of a named or specified person as the liquidator of the respondent. This prayer is resisted or opposed by the respondent who submits that the power to so appoint a liquidator is the preserve of the Master of the High Court and not this Court. That is the only ground of objection in this application and I deal with such objection hereinunder.
- [3] As already stated above, that the respondent is legally unable to pay its debts is not disputed. The only issue is whether or not this Court may grant the prayer for the appointment of a liquidator. The applicant submits that as the winding up proceedings are before this Court, the relevant Act permits this Court to grant such order or prayer. This is disputed by the respondent.
- [4] The applicant has placed reliance for its application on the provisions of Section 289 (2) of the Act which states that:

‘(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 --- until a provisional liquidator has been appointed by the Court and has furnished security as provided in Section 337 (2):’

Both parties herein are in agreement that the reference to Section 337 (2) of the Act is a patent error as that section does not deal with the issue of security for the liquidation. The applicant, however, submits that the appointment of a provisional liquidator by the Court is clearly sanctioned by the quoted provisions and also by practice within this jurisdiction.

[5] In terms of Section 303 of the Act, where the winding up is being done through the Court, as in the present application, ‘--- all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.’

This is also the case whenever the office of the liquidator is vacant or the liquidator is, for whatever reason or cause, unable to do his duties.

[6] Section 309 of the Act provides that:

‘For the purpose of conducting the proceedings in a winding up of a company, a liquidator shall be appointed in the manner as hereinafter provided.’

The obvious meaning of these provisions is that in dealing with or conducting winding-up proceedings or process, a liquidator or liquidators must be appointed and such appointment must be in a manner provided in the sections after Section 309 of the Act. That, however, relates to the manner of appointment and not who makes the appointment, i.e, the Master or the Court.

[7] Once a winding up order has been made, or a resolution for a voluntary winding-up has been registered or in the case of a member’s winding-up of the company, the Master has the power to appoint a provisional liquidator from amongst those persons nominated by the company as per its resolution referred to in Section 289 (2) (a) (i) (See also Section 310 and 311 (1) of the Act). Section 311 (2) (a) of the Act specifically lays down that:

‘In the case of a Creditor’s voluntary winding-up by the Court of a company, the Master shall, subject to the provisions of Section 296 appoint the person or persons nominated by the meetings referred to in Section 311 as liquidator of the company concerned ---.’

Again Section 312 of the Act gives the Master the power and or authority to decline to appoint a person or persons nominated by the company as liquidator or liquidators under certain defined circumstances or instances.

- [8] From the general scheme and tenor of the Act, the power to appoint a liquidator rests with the Master. The Court may, on application by the Master or any other person who has the requisite interest or standing, order the removal of a liquidator from office. Additionally, the Act grants the power of control over the liquidator to the Master. This is of course not to say that he is at liberty to act in any manner. He has to act within the supervisory powers granted to him by the Act or law in general. (See Section 323 of the Act).

- [9] Section 309 of the Act is similarly worded to Section 367 of the South African Companies Act 61 of 1973. Henochsberg on the Companies Act (Meskin) Vol.1 at 787 – 788 states as follows on the South African Companies Act:

‘Whether the winding-up is by the Court or is voluntary, the appointment of a liquidator or liquidators is by the Master alone. In the case of a winding-up by the Court, the Master cannot make the appointment until the first meetings of creditors and members (or contributories) have been held ---.

In the case of members' voluntary winding-up, the Master cannot make the appointment unless and until the resolution envisaged by Section 356 (2) (a) (i) has been adopted ---.

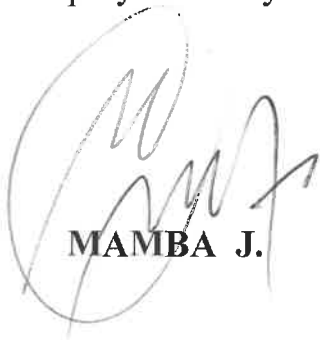
In the case of a creditor's voluntary winding-up, the Master cannot make the appointment until either the first meetings of creditors and members (or contributories) have been held (Section 364 (1) or until the first meeting of creditors has been held (Section 34 (1) (a) and the company in general meeting, when adopting the special resolution authorising the winding up, adopted a resolution nominating a person or persons for appointment as liquidator or liquidators ---.

The appointment of a liquidator may be preceded and in practice normally is preceded by the appointment by the Master of a provisional liquidator (Section 368).'

- [10] From the above analysis of the law and the legal principles involved regarding the appointment of a provisional liquidator and liquidators, it is plain to me that the power or duty to appoint such person or persons is the preserve of the Master and not this Court. The reference in Section 289 (2) of the Act to the Court appointing a liquidator is clearly erroneous and so is the reference to the provision of security in terms of Section 337 (2). I

have no doubt that the drafters of the Act meant to grant this power to the Master and not the Court. It is an inadvertent aberration.

[11] For the foregoing reasons, I hold that the power and duty to appoint a provisional liquidator or substantive liquidator resides with the Master and not this Court. The objection is thus upheld with costs. The rest of the prayers are by consent granted.



MAMBA J.

For the Applicant : Adv. P.E. Flynn

For the Responded : Mr M. Mntungwa