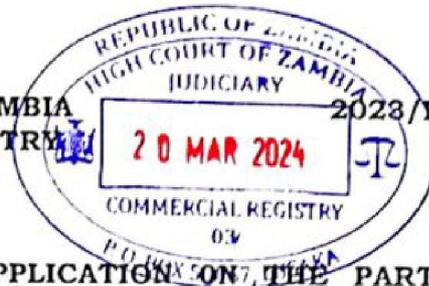


IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)



2023/HPC/0819

IN THE MATTER OF: AN APPLICATION ON THE PART OF YANDE MWENYE, IN HER CAPACITY AS MEMBER OF CROWE HORWATH WELSA ACCOUNTANTS ZAMBIA LIMITED FOR WINDING UP OF CROWE HORWATH WELSA ACCOUNTANTS ZAMBIA LIMITED

IN THE MATTER OF: SECTION 56 (1) (c), 57 (1) (e) AND 57 (1) (g) OF THE CORPORATE INSOLVENCY ACT NO. 9 OF 2017 OF THE LAWS OF ZAMBIA

BETWEEN:

YANDE MWENYE  
(In her capacity as member of Crowe Horwath Welsa Accountants Zambia Limited)

PETITIONER

AND

CROWE HORWATH WELSA ACCOUNTANTS ZAMBIA LIMITED

RESPONDENT

Before the Hon. Mr Justice K. Chenda on 19<sup>th</sup> March 2024

For the Petitioner: Mr E.K. Mwitwa and Mr E.B. Kaluba of Mwenye & Mwitwa Advocates with Ms. S. Patel of AB & David

For the Respondent: Mr M. Nkulukusa and Mr M. Kapandula of NCO Advocates

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## JUDGMENT

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### 1 INTRODUCTION AND BACKGROUND

1.1 The Petitioner is one of the minority shareholders of the Respondent company and was at some point its Managing Director.

- 1.2 The majority shareholder is Crowe Horwath International (Private) Limited ("**CHI (Private) Ltd**"), a Zimbabwean company.
- 1.3 Differences arose between the Petitioner and CHI (Private) Ltd., consequently, the Petitioner took out this action on 24<sup>th</sup> November 2023 seeking that the Respondent be wound-up.
- 1.4 The Petitioner also sought the interlocutory relief of appointment of a provisional liquidator, which I declined by ruling dated 18<sup>th</sup> January 2024.
- 1.5 I heard the petition today and formed the view that this is a proper case to invoke Order 36 Rule 2(1)(a) of the **High Court Rules**, under Cap. 27 to render my decision *ex-tempore*, which I hereby do, as set out below.

## **2 THE LAW ON WINDING-UP BY THE COURT**

- 2.1 The law on the subject enjoys codification in form of the **Corporate Insolvency Act**, No. 9 of 2017 (the "**CI Act**").
- 2.2 The salient provisions of the **CI Act** of relevance to this case can be summed up as follows-

- 2.2.1 the type of companies amenable to the court's jurisdiction to wind up are either companies incorporated in Zambia or qualifying foreign companies (see s.55);
- 2.2.2 the mode of commencement is by petition (see s.56(1));
- 2.2.3 *locus standi* to petition is reserved for the company itself, creditors, qualifying members, the personal representative or trustee in bankruptcy of a member, a liquidator, the Registrar of PACRA, or the Official Receiver (see s. 56 (1) (a)-(g));
- 2.2.4 qualifying members to petition are those who are either the original allottees of the company or have been shareholders for a minimum of 6 months or are shareholders by devolution / operation of law (see s. 56 (2));
- 2.2.5 the grounds for winding up are exhaustively prescribed as any of the following (see s.57 (1) and (2) )-
- (i) passing of a special resolution to wind up;
  - (ii) inability to pay debts;
  - (iii) circumstances, under the articles, which warrant a winding-up;
  - (iv) membership reducing to less than two;
  - (v) formation for unlawful purpose;

- (vi) incorporation done fraudulently;
- (vii) it being just and equitable to wind-up; or
- (viii) for persistent breaches of the **CI Act**.

### **3 ANALYSIS AND FINDINGS**

- 3.1 It is uncontroverted that the petition has been brought by a member of the Respondent company who has held shares since 14<sup>th</sup> May 2020 (see para. 3.2 of petition and para. 4 of the answer). The locus standi threshold for the Petitioner under s.56(1) and (2) of the **CI Act** has thus been met.
- 3.2 It is also not in issue that the Respondent was incorporated in Zambia (see para. 2.1 of the petition and para. 2 of the answer). The amenability threshold for the Respondent under s.55 of the **CI Act** is also satisfied.
- 3.3 What is however hotly contested is whether the grounds for petitioning have been established. For context, the two grounds advanced by the Petitioner in seeking winding-up of the Respondent are that unknown to her:
- 3.3.1 the Respondent was allegedly formed for an unlawful purpose; and
  - 3.3.2 that it just and equitable to do so.

3.4 The facts and evidence also show that there is serious acrimony between the Petitioner and CHH (Private) Ltd., which is controlling the Respondent for purposes of this case.

3.5 I have chosen to steer clear of that acrimony which is radiocative as it runs the risk of convoluting the core contentions herein. Instead I will focus on the positions of the parties in as far as they are actually relevant to the proper determination of this petition.

3.6 Of relevance, the Petitioner has in a nutshell complained that the Respondent was incorporated to provide services of accounting, auditing and tax consultancy in Zambia (the “**accountancy services**”) and yet:

3.6.1 it does not qualify to be licenced by the Zambia Institute of Chartered Accountants (“**ZICA**”) to provide the accountancy services; and

3.6.2 other than her, the other stakeholders in the Respondent are not qualified or licenced to engage in the practice of accountancy in Zambia. See paras. 2.3, 3.3 and 3.4 of the petition.

3.7 The Petitioner also averred that on 19<sup>th</sup> January 2023, ZICA directed that the Respondent be wound-up and the business enterprised rebooted as firm whose partners are duly licenced by ZICA. She averred that she has since set up that firm and that the Respondent ought to be wound-up as it was incorporated as a vehicle for unqualified foreigners to illegally practice accountancy in Zambia. See para. 3.6, 3.10 and 3.13 of the petition.

3.8 The Respondent for its part has, of relevance, countered the Petitioner's complaint by asserting that -

3.8.1 the objects of the Respondent company have since changed and it has ceased to provide the accountancy services such that it is immaterial that the Respondent's other members are not qualified and licenced to offer the accountancy services;

3.8.2 it has also changed its name to Crowe Advisory Services Limited from Crowe Horwath Welsa Accountants Zambia Limited;

3.8.3 there is no illegality being perpetrated by the Respondent; and

3.8.4 ultimately, there is no cause for it to be wound-up. See paras. 5, 7, 8, 9, 11 and 12 of the answer.

3.9 I have studied the evidence tendered and closely reflected on the elaborate and well reasoned arguments advanced by Counsel. After a careful consideration, my findings are as follows.

3.10 I will begin with the first ground for seeking winding-up, namely that the Respondent company was allegedly incorporated for an unlawful purpose.

3.11 The **Accountants Act**, No. 13 of 2008 reserves the practice of accountancy in Zambia for persons licenced by ZICA and prescribes the form of business enterprise for provision of the accounting services as firms registered under the **Registration of Business Names Act** (see s.18(1) and (6), s.24).

3.12 In the case before Court, the uncontroverted evidence is that the Respondent was set up as a company to practice accountancy in Zambia. Further, there is no evidence that the persons behind its incorporation were themselves licensed by ZICA.

3.13 I thus find that the Respondent was incorporated for the unlawful purpose of unqualified persons offering accountancy services and (for that matter) behind the veil of incorporation, contrary to the mentioned provisions of the **Accountants Act**.

3.14 The Respondent's sole witness tried to explain in cross examination that the election to use an incorporated entity (the Respondent) as the vehicle for the accountancy services was done after its proponents consulted ZICA and PACRA.

3.15 However, that excuse is not a saving grace as it is a settled position that ignorance of the law is no defence. A notable authority on the point is **Communications Authority v Vodacom Zambia Limited** - (2009) ZR 196 at p.229-230.

3.16 I now move on to consider the second ground for winding-up namely that it is allegedly just and equitable to do so.

3.17 The evidence shows that by letter dated 15<sup>th</sup> February 2023, ZICA guided that the Respondent should not offer any services regulated by ZICA. See exhibit "RS5" in the affidavit in support of answer.

- 3.18 The Respondent has argued that it has complied with that guidance by re-aligning its business to exclude services regulated by ZICA.
- 3.19 However close review of the Respondent's evidence shows that the new business model includes provision of receivership and business rescue services. See para. 26 of the affidavit in support of answer and exhibit "RS7" therein.
- 3.20 That is material because receivership and business rescue are insolvency proceedings under the **CI Act**, which in turn reserves insolvency practice for Zambian licenced lawyers and accountants (see definitions in s.2(1) and eligibility criteria in s.143).
- 3.21 The **CI Act** in s.143, expressly defers the definition of the qualifying accountant to that provided for in the **Accountants Act**. Section 2 of the latter statute defines accountant with reference to those registered under the statute.
- 3.22 The mandate to register and regulate the professional conduct of accountants is vested in ZICA (s. 5(2) and 12(1) of the **Accountants Act**).

3.23 It follows therefore that the insolvency practice is actually indirectly regulated by ZICA as while PACRA is the primary regulator, ZICA (like the Law Association of Zambia, "LAZ") is a secondary regulator. This is because insolvency practitioners are drawn from its membership who are bound by rules of professional conduct and ethics, the infringement of which is subject to punishment by the disciplinary arm of ZICA (see s.72, 73 and 74 of the **Accountants Act**).

3.24 It is also noteworthy that the Respondent's evidence shows that it asserts itself as the entity entitled to trade under the 'Crowe' brand in Zambia and that Crowe a premium global brand of auditing, accounting and related services. See para. 5 and 19 of the affidavit in support of answer. There is no evidence on record to show that the Respondent has actually abandoned that mission.

3.25 Therefore, I find in these circumstances that the Respondent has in fact defied the directive of ZICA by continuing on the path of regulated activity (receivership and business rescue services - insolvency practice). It is also clear that it has done so under the camouflage of simply changing its name (from one that announced its

accountancy services to a less obvious one). In any event, such a step does not absolve the Respondent from atoning for its illegalities. My authority is s.47 of the **Companies Act**, No. 10 of 2017.

3.26 Further, the Respondent's re-aligned model to offer receivership and business rescue services (as an unqualified person) infringes on the regulatory mandate of PACRA (as part of accreditation) before one can venture into insolvency practice.

3.27 Accordingly, not only was the formation of the Respondent tainted with unlawful purpose, but that unlawful purpose has tactfully evolved and continued to be perpetrated as outlined above.

3.28 Thus, on the totality of the foregoing, I am of the firm opinion that over and above the established ground of formation for illegal purpose, it is also just and equitable for the Respondent company to be wound-up in order to:

3.28.1 protect the integrity of the professions of accountancy and insolvency practice in Zambia and curb the risk of them being unlawfully hijacked by foreign interests; and

3.28.2 ultimately, protect the unsuspecting **Zambian** public from service providers (and / or persons behind them) whose conduct and ethical standing is illegally 'free' from the radar of the mandated professional regulators (ZICA, LAZ and PACRA).

3.29 It has been passionately argued for the Respondent that this Court should consider alternative remedies to winding-up and that the Respondent could easily adjust its objects and business activities if needed for conformance. Counsel has also been industrious enough to back it up with a series of cases of persuasive value.

3.30 Impressive as the authorities may be, I have opted to seek guidance from the express statutory provision in particular s.60(4) of the **CI Act** which actually requires this Court to consider an alternative remedy to winding up for 'just and equitable' grounds. The import is that in order to be considered, such alternative remedy should actually exist but have been unreasonably avoided by a petitioner.

3.31 In the case before Court, the only feasible alternative that the Respondent has suggested is change of objects and business to exclude anything found to be illegal.

3.32 However, I decline to fault the Petitioner for not pushing for any such measure as the evidence shows that the majority shareholder (CHI (Private) Ltd.) had bypassed her in changing the initial name and objects. Accordingly the Petitioner does not appear to have any meaningful voice to pursue an alternative remedy.

3.33 Furthermore, as rightly argued by the Petitioner's Counsel, there is still the insurmountable obstacle of incorporation for unlawful purpose. No authority has been cited that it can be cured retrospectively to allow for an alternative remedy to winding-up.

3.34 The nail in that coffin is that s.57(1)(e) of the **CI Act** looks to the past in terms unlawful purpose at incorporation not unlawful activities thereafter. The latter can simply be abandoned (as a remedy) while history cannot be rewritten to overcome the former.

#### **4 CONCLUSION AND ORDERS**

4.1 Professionals from other countries are obviously welcome in our peaceful and stable country. However, their business enterprises must play by the rules and where

they fall short, the Courts will be there as gate-keepers to enforce the rule of law.

4.2 In the case at hand, the Petitioner has proven that there is cause for winding-up the Respondent under both s.57(e) and (g) of the **CI Act**.

4.3 Therefore, this Court doth order that the Respondent company be wound up under the said provisions of the **CI Act**.

4.4 It is further ordered:

4.4.1 that the Petitioner is at liberty to apply by summons for appointment of a liquidator with proof that the intended appointee is duly accredited and paid up as an insolvency practitioner;

4.4.2 that the application be filed within 14 days from date hereof, failing which recourse shall be had to the provisions of s.67(2) of the **CI Act**; and

4.4.3 that the costs of the Petitioner occasioned by this petition be taxed and paid out of the assets of the Respondent company.

Dated at Lusaka this 20<sup>th</sup> day of March 2024.



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**K. CHENDA**  
**Judge of the High Court**

J14