International Journal of Law, Humanities & Social Science ©
Volume 4, Issue 4 (June 2020), P.P.55-62, ISSN: 2521-0793

THE LEGAL FRAMEWORK ON WINDING UP IN MAURITIUS: A CRITICAL ASSESSMENT FROM A COMPARATIVE PERSPECTIVE

Roopanand Mahadew[1]

[1](*Senior Lecturer, Department of Law, Faculty of Law and Management, University of Mauritius Reduit, Mauritius)*

Abstract: *This paper critically assesses the legal framework on winding up of companies in Mauritius. The Insolvency Act (2009) which is the main legislation on the subject matter is analysed in relation to both compulsory liquidation and the two types of voluntary liquidation, that is shareholders' and creditors' voluntary winding up. This has been conducted in comparison with the United Kingdom's legislative framework on winding up. This paper provides for an insight to winding up of companies in Mauritius which is becoming significantly important in the current ever-changing business world.*

Keywords: Mauritius, Winding Up, Liquidation, Insolvency Act
Research Area: Law
Paper Type: Research Paper

1. INTRODUCTION

While the paramount aim of any business is to make a profit and to grow economically, some companies often fail to achieve this particular goal leaving behind debts. In such a situation, it is best to liquidate the company to settle the debts, resulting in the death of the company. This procedure is referred to as winding-up. A liquidation process is not solely due to a business becoming insolvent. A common reason for liquidation is for the directors/shareholders to close a company which has accumulated large reserves and to realise the value in a tax-efficient way

Winding up is the process of liquidation of assets of a corporation or partnership, settling accounts, paying debts and liabilities, distributing remaining assets to partners or shareholders, and then dissolving the business. In McPherson's Law of Company Liquidation, liquidation has been defined as "a process whereby the assets of a company are collected and realised, the resulting proceeds are applied by discharging all debts and liabilities, and any balance which remains after paying all costs and expenses of winding up is distributed among the members according to their rights and interests, or otherwise dealt with as the constitution of the company directs" (McPherson, 1994). It is noted that the terms liquidation, winding up and dissolution are normally used interchangeably though dissolution refers to the last stage of liquidation.

Liquidation may either be compulsory (sometimes referred to as a court liquidation) or voluntary (sometimes referred to as a shareholders liquidation), although some voluntary liquidations are controlled by the creditors. A Voluntary Liquidation is started by resolution of the company's Directors and then its Shareholders. A Voluntary Liquidation takes one of two forms depending on the solvency of the company (if it can pay its debts when they fall

due). Solvent companies require a Members Voluntary Liquidation (MVL). Insolvent companies require a Creditors Voluntary Liquidation (CVL). A Members Voluntary Liquidation (MVL) is a formal way to wind up a solvent company. An MVL requires the company to be able to pay all of its debts and that all tax lodgements are up to date. If a company is insolvent (that is it cannot pay its' debts when they fall due) then it needs a Creditors Voluntary Liquidation (CVL) which is still initiated by at the shareholders of a company. As for Court Liquidation, a creditor of the company applies to the court to force the debtor company into liquidation. The process to do so is lengthy and can be relatively expensive for the creditor. The process involves the creditor serving a Statutory Demand on the company to pay a debt pursuant to the law. If the company fails to pay the money demanded in the Statutory Demand the creditor then makes an application to the Court to have the company wound up (Sanderson, 2018).

2. THE LEGISLATIVE FRAMEWORK ON WINDING UP IN MAURITIUS

The main law regarding winding up in Mauritius is the Insolvency Act (IA) 2009. The main purpose of this Act is to amend and consolidate the law relating to insolvency of individuals and companies and the distribution of assets on insolvency and related matters. Section 100 of the IA provides for three modes of winding up namely by way of a winding-up order made by the Court, by way of a voluntary winding up commenced by a resolution passed by the company and by way of a resolution of creditors passed at the watershed meeting. The commencement of the winding procedure is regulated by Section 101 of the IA. It is noted that the commencement is an important aspect in the process since it allows to determine when the liquidator takes control of the company affairs and from what point in time the liquidator can go back in time to challenge voidable or seek to impose liabilities on others. According to Section 100(1)(b) of the IA, a voluntary winding up may be (1) a creditors' voluntary winding-up where the company is insolvent and the liquidator is appointed by a meeting of creditors; (2) a shareholders' voluntary winding up where the company is solvent and the liquidator is appointed by a shareholders' meeting.

As for a petition for winding up for a compulsory winding up, Section 102 provides a list of persons who can submit such as petition which includes the company, a contributory or any person who is the heir of a deceased contributory or the trustee in bankruptcy of the estate of a contributory; a shareholder; a creditor, including a contingent or prospective creditor, of the company; a liquidator, the administrator; the Director or Registrar of Companies and the Financial Services Commission. The petition for winding up may be presented where (1) the company has by special resolution resolved that it be wound up by the Court (2) the company is unable to pay its debts (3) the directors have acted in the affairs of the company in their own interests rather than in the interests of the shareholders as a whole, or in any other manner which is unfair or unjust to other shareholders (4) the directors or managers of the company have acted to conceal the assets of the company or remove assets outside the jurisdiction with intent to defeat creditors (5) the Court is of the opinion that it is just and equitable to do so.

2.1 Determining Inability to Pay Debts

Under section 178 of IA 09, unless the contrary is proved (and subject to s 179 of IA), a company will be presumed to be unable to pay its debts if (1) it has failed to comply with a statutory demand; or (2) execution issued against the company in respect of a judgment debt has been returned unsatisfied; or (3) a person entitled to a charge over all or substantially all the property of the company has appointed a receiver under the instrument creating the charge; or (4) a compromise between a company and its creditors has been put to a vote in accordance with Companies Act 2001 but has not been approved. Section 179 of IA 09 provides that evidence of failure to comply with a statutory demand will not be admissible as evidence that a company is unable to pay its debts unless the application is made within 1 month after the last date for compliance with the demand. Section 177 of IA 09 (and the presumption of insolvency it creates) will not prevent proof by other means that a company is unable to pay its debts as they become due in the ordinary course of business. In determining whether a company is unable to pay its debts, its contingent and prospective liabilities may be taken into account.

2.2 The Concept of Just and Equitable

The just and equitable winding-up petition demarcates itself from the standard creditor's petition. It is a bespoke and specific winding up petition designed to deal with shareholder disputes in a company. As per Section 102(5)(g) of the IA, it is open to the Court to wind up a company on just and equitable grounds where there has been a breakdown in mutual trust and confidence which is impeding the management of the company. However, the power of the Court to wind up a company on just and equitable grounds is a discretionary remedy and therefore, the Court will consider each application subjectively and weigh up all factors having regard to the equity of the outcome and whether it is appropriate to take such action which may often be against the interests of one or more of the shareholders. As stated above, a winding-up petition issued on 'just and equitable grounds' is a different type of petition to a standard creditor's petition. Rather than being issued by a creditor of a company, a 'just and equitable' petition is issued in the case of a shareholder dispute.

This type of petition is also present in the UK's jurisdiction. According to Davies (2003), the provision was influenced by the (then uncodified) partnership law and was originally used mainly in cases where the company was deadlocked. In the course of this century, it has been moulded into a means of subjecting small private companies to equitable principles derived from partnership law when they were in reality incorporated partnerships. The leading English case on the matter is Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492 which has inspired the Court in the Australian case of Re Dalkeith Investments Pty Ltd 9 ACLR 247. All cases related to the 'just and equitable' ground can be categorised under one of the four groups (1) Expulsion or exclusion from office (Ebrahimi v Westbourne Galleries Ltd) (2) Justifiable loss of confidence (Loch v John Blackwood Ltd) (3) deadlock (Re Yenidje Tobacco Co Ltd [1916] 2 Ch 426) (4) failure of substratum (Re Haven Gold Mining Co (1882) 20 Ch D 151).

2.3 Duties and Powers of Liquidator

According to Section 117 of the IA, a liquidator shall, within 7 days of being appointed or being notified of his appointment, give public notice of his appointment, the date of the commencement of the liquidation and the address and contact number to which, during normal business hours, inquiries may be directed by a creditor or shareholder. He should also, within 7 days of being appointed or being notified of his appointment, submit to the Director notice of his appointment. The liquidator also has the responsibilities of preparing a list of every known creditor of the company, preparing and submitting to the Director a report containing the details, including a statement of the company's affairs, proposals for conducting the liquidation, and, where practicable, the estimated date of its completion and sending a copy of the report and a notice explaining the right of a creditor or shareholder to require the liquidator to call a meeting of creditors under section 108(3)(b) to every known creditor and shareholder. Every 6 months as from the commencement of the liquidation procedure, the liquidator must also send a report to creditors, shareholders and the Director of Insolvency Services on the conduct of the liquidation during the preceding 6 months and of any further proposals which the liquidator has for completing the liquidation. It has to be noted also that a liquidator who considers that the company or any person has committed an offence concerning the company or has been guilty of any negligence, default, breach of duty or trust in relation to the company or committed any offence that is material to the liquidation under the Companies Act, the Securities Act, the Financial Services Act 2007 or the Criminal Code is required by the law to submit a written report of that fact to the Director and give him such information or documents, and such assistance, including further reports, and access to and facilities for inspecting and taking copies of any documents.

As for the powers of the liquidator, in addition to what the substantive provisions of the IA provide for, there is the Sixth Schedule of the IA which lists down his powers in a detailed and comprehensive manner. Accordingly, the liquidator can commence, continue, discontinue and defend legal proceedings; carry on the business of the company to the extent necessary for the liquidation; appoint a lawyer; with the leave of the Committee of Inspection or the Court pay any class of creditors in full; subject to section 152 make a compromise or an arrangement with creditors or persons claiming to be creditors or who have or allege the existence of a claim against the company, whether present or future, actual or contingent, or ascertained or not and compromise calls and liabilities for calls, debts and liabilities capable of resulting in debts and claims, present or future, actual or contingent, or ascertained or not, subsisting or supposed to subsist between the company and any person and all questions relating to or affecting the assets or the liquidation of the company, on such terms as may be agreed, and take security for the discharge of any such call, debt, liability or claim and give a complete discharge.

The liquidator also has the powers to sell or otherwise dispose of the property of the company with the approval of the Committee of Inspection; act in the name and on behalf of the company and enter into deeds, contracts and arrangements in the name and on behalf of the company; prove, rank and claim in the bankruptcy or insolvency of a shareholder for any

balance against that person's estate, and receive dividends in the bankruptcy or insolvency, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors; draw, accept, make and endorse a bill of exchange or promissory note in the name and on behalf of the company with the same effect as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business; borrow money whether with or without providing security over the company's assets; take action in his name as liquidator for transfer to the heir or executor of a deceased shareholder of any shares in the names of the deceased and to do in that name any other act necessary for obtaining payment of money due from a shareholder or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall be deemed to be due to the liquidator; call a meeting of creditors or shareholders for (i) the purpose of informing creditors or shareholders of progress in the liquidation (ii) the purpose of ascertaining the views of creditors or shareholders on any matter arising in the liquidation (iii) such other purpose connected with the liquidation as the liquidator thinks fit; and appoint an agent to do anything which the liquidator is unable to do.

It has to be noted that the Mauritian legislator has somewhat followed the English legal framework on the powers and duties of Liquidator. The English Insolvency Act 1986 also provides for the powers and duties of liquidators in a separate Schedule no 4 to the main Act. It can be said that the Mauritian IA seems to be providing for more details on the powers and duties of liquidators in Mauritius compared to the English counterpart which perhaps also relies heavily on case law and jurisprudence as a source of law. It is, however, a positive aspect of the Mauritian law to be listing down the details duties and powers of the liquidators so as to avoid subjectivity which can be created when the law is not clear. The powers of liquidators in the UK has also been limited by court decisions in several instances. In the Scottish case of Re Quantum Distribution (UK) Limited (In Liquidation) [2012] CSOH 191 (18 December 2012), the liquidator came under heavy criticism for having bypassed the Court to obtain remuneration and in the case of Re Prestonpans (Trading) Limited (In Administration) [2012] CSOH 184 (4 December 2012), the liquidator failed to follow the proper procedure to seek remedy for gratuitous alienations by the means of a petition.

It should also be noted that a liquidator must be a licensed insolvency practitioner and only Mauritian residents are entitled to such licence. There is no provision for the entry into protocols or other cooperation with foreign insolvency practitioners. The Part of the Insolvency Act dealing with cross-border insolvencies and which is based on the UNCITRAL Model Law has not been proclaimed yet. The Companies Act also provides for the restructuring of companies outside of a formal liquidation. This can be either by way of a compromise with creditors approved at a creditors' meeting, or a scheme of arrangement approved by the Court.

3. EFFECTS OF LIQUIDATION

The main outcome of a liquidation process is the fact that the company ceases to remain in existence. It will be struck off from the register of the Registrar of Companies and will no more exist as a separate legal personality or entity conferred to it by the process of

incorporation. Liquidation has others effects specifically on creditors, directors and employees which are considered in this section.

3.1 What Does Compulsory Liquidation Mean for a Creditor of the Company?

Unsecured creditors which have claims against the company in liquidation are paid on a pari passu basis. The pari passu principle means that all unsecured creditors in insolvency processes, such as administration, liquidation and bankruptcy must share equally any available assets of the company or individual, or any proceeds from the sale of any of those assets, in proportion to the debts due to each creditor. It is one of the most fundamental principles of insolvency law, although it can be varied by agreement. In certain instances, the dividend to unsecured creditors will be just a few pence in the pound, and it may be nothing at all. If a creditor has a form of security against his claim, he is entitled to be paid from the proceeds of the sale of the secured assets, subject to certain exceptions.

3.2 What Does Compulsory Liquidation Mean for an Employee of the Company?

Very often, it is the employee that is at the most vulnerable position when a company is wound up. For them, it may not be a question of profit or loss but a means of subsistence and means of living. There is no doubt that employees are also heavily affected by the winding up of a company. A winding-up implies an automatic dismissal of all the employees. However, in the capacity of a formal employee of the company, one may be entitled to a redundancy payment. There is also the possibility of claims for damages on the grounds of wrongful dismissal. Generally, employment rights related legislation will regulate the matter. For instance, in the Employment Rights Acts 2008 of Mauritius, economic reasons (causing a winding-up) is regarded as a valid reason for dismissal which will then not amount to unfair dismissal. In has to be noted also that since these types of events can be of a politically sensitive nature, there can always be negotiations for the employee to be paid their last salary or an additional one or that they be recycled or assisted in finding another employment.

3.3 What Does Compulsory Liquidation Mean for a Director of the Company?

When a company goes into compulsory liquidation, it implies that the powers of the directors are completely suspended and they are automatically dismissed from office. This what reiterated in the case of Measures Brothers Ltd v Measures [1910] 2 Ch 248. In the capacity of a former director of a company, one may be required to assist the liquidator by providing a segment of the company's assets and liabilities.

3.4 What Does Compulsory Liquidation Mean for a Shareholder?

Although shareholders are not liable for the insolvent company's debts by virtue of the corporate veil, a shareholder can be liable to contribute to the assets of the company up equivalent to the amount unpaid on his shares. Capital calls can be ordered by the board or the receiver in this respect. As a general principle, section 125(1) of the IA provides that where a company is wound up, every present and past shareholder is liable to contribute to the assets of the company in an amount sufficient for the payment of its debts and expenses of the winding-up. Past shareholders of a company limited by shares are not liable to

contribute where they have ceased to be a member for one year or more before the commencement of the winding-up, unless it appears to the court that the existing shareholders are unable to satisfy the contributions required to be made by them under the IA (Hurry, 2019).

4. CONCLUSION

Liquidation is considered as a final resort measure in insolvency law. It has to be noted that its consequences are drastic and irreversible. Courts across the world have preferred to pronounce on winding up by courts only in cases where it is mandatorily required without any other alternative. The legal framework on insolvency provides for other softer and more recuperative measures such as receivership and administration which can be considered as giving the company a second chance for revival. However, when it comes to the best interests of creditors and other stakeholders of the company, many times liquidation or winding up presents itself as the best legal measure.

Liquidation in Mauritius is strictly regulated by the Insolvency Act and there is a specialised court, the Commercial Division of the Supreme Court, which specialises in matters of insolvency. Since it is a procedure that deals with a significant amount of investments by shareholders, it implies that guidelines and regulations concerning the subject matter must be strictly applied. It remains a dynamic area and the Mauritian legislator must ensure that the framework is constantly reviewed by drawing inspiration from novel and innovative legal framework which is being developed on insolvency across the world.

REFERENCES

Books

Goode, R.M., 2011. Principles of corporate insolvency law. Sweet & Maxwell.

Keay, A. and Walton, P., 2003. Insolvency law: C

Omar, P., 2004. European insolvency law. Ashgate Publishing. orporate and personal. Pearson.

Journal Article

Avilov, G., Black, B., Carreau, D. and Kozyr, O., 1998. General principles of company law for transition economies. J. Corp. L., 24, p.190.

Booth, C.D., 1999. When Government Intervenes: Winding Up Fraudulent Companies in Hong Kong. Hong Kong LJ, 29, p.368.

Bris, A., Welch, I. and Zhu, N., 2006. The costs of bankruptcy: Chapter 7 liquidation versus Chapter 11 reorganization. The journal of finance, 61(3), pp.1253-1303.

Chesterman, M.R., 1973. The Just and Equitable Winding up of Small Private Companies. Mod. L. Rev., 36, p.129.

Franks, J. and Sussman, O., 2005. Financial distress and bank restructuring of small to medium size UK companies. Review of Finance, 9(1), pp.65-96.

Goode, R.M., 1983. Is the Law Too Favourable to Secured Creditors. Can. Bus. LJ, 8, p.53.

Hornstein, G.D., 1940. A Remedy for Corporate Abuse--Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder. Columbia Law Review, 40(2), pp.220-251.

McPherson, B.H., 1964. Winding up on the Just and Equitable Ground. Mod. L. Rev., 27, p.282.

Shleifer, A. and Vishny, R.W., 1992. Liquidation values and debt capacity: A market equilibrium approach. The Journal of Finance, 47(4), pp.1343-1366.

Voszka, E., 1986. Company liquidation without a legal successor. Acta Oeconomica, pp.59-71.

List of Cases

Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492

Re Dalkeith Investments Pty Ltd 9 ACLR 247

Ebrahimi v Westbourne Galleries Ltd

Loch v John Blackwood Ltd 1923 AC 783

Re Yenidje Tobacco Co Ltd [1916] 2 Ch 426

Re Haven Gold Mining Co (1882) 20 Ch D 151

Re Quantum Distribution (UK) Limited (In Liquidation) [2012] CSOH 191

Re Prestonpans (Trading) Limited (In Administration) [2012] CSOH 184

Measures Brothers Ltd v Measures [1910] 2 Ch 248

List of Legislations

Insolvency Act 2009 Mauritius

Insolvency Act 1986 UK