REGGIE FRANCIS SARUCHERA
(In his capacity as the final judicial manager
of IRAMZIM TEXTILES P/L & TRAVAN BLANKENTS P/L)
versus
VALLECO INVESTMENTS P/L
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 30 March 2021 & 13 February 2023

Court Application

Adv G Madzoka, for the applicant
Adv T Zhuwarara, for the 1st respondent
No apprearance for the second respondent

CHINAMORA J:

This is a court application to sell assets of companies under judicial management in terms of section 307 of the Companies Act [*Chapter 24:03*]. As I waded through the application, it became apparent that the application was brought in terms of s 307 of Companies Act after its repeal. Consequently, I dismissed the application and directed the applicant to pay first respondent's costs.

It is not disputed that Irazim Textiles (Pvt) Ltd, a company operating a textile mill, spinning, weaving and finishing of textile, and Travan Blankets (Pvt) Ltd, a blanket manufacturing company experienced viability challenges in 2009. On 23 October 2013, the two companies were placed under provisional judicial management under HC 8370/13 and, subsequently, under final judicial management on 2 April 2014. One Reggie Francis Saruchera (the applicant in this matter) was appointed the judicial manager of the two companies. In his turnaround strategy, the applicant identified the first respondent as an investor in the two companies. He then structured a scheme of

arrangement in terms of section 191 of the Companies Act [*Chapter 24:03*]. The scheme was duly sanctioned by this court on 6 June 2019.

In terms of (and pursuant to) the scheme of arrangement, the respondent acquired the two companies. Furthermore, the two companies and the first respondent entered into an agreement in which the first respondent (as the investor) was required to pay a transaction fees amounting to three percent (3%) of the total price to the applicant in his capacity as the judicial manager. The fees were approved by the second respondent and are in the amount of ZWL 170,166-33 and US$303,187-32. The said amounts did not include VAT. The applicant recovered some of the fees from the two companies, except an amount of US$295,201-47 which remains outstanding.

The applicant demanded payment from the first respondent, who refused to settle the same on the basis that it had complied with all the terms of the scheme of arrangement. In addition, the applicant alleges that the two companies have obsolete equipment and scrap which comprises of boilers and various textile machinery all valued at an amount in excess of US$366,000-00. As a result, the applicant desired to dispose the assets aforementioned to meet the judicial manager's fees and the second respondent's fees. The applicant, therefore, prayed for the following order:

> "IT IS ORDERED THAT:
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> 1. The first respondent shall pay the applicant an amount of US$295,201-47, being outstanding judicial management fees exclusive of VAT together with the VAT thereon and the Master's fees in the sum of ZWL 25,295-68 within 7 days of service of this order upon it.
> 2. Failing compliance with para 1 above, the applicant be and is hereby granted leave to dispose of by private treaty the obsolete equipment and scrap of Irazim Textiles (Pvt) Ltd and Travan Blankets (Pvt) Ltd, the companies under judicial management, to meet the fees stipulated in paragraph 1 above.
> 3. The first respondent shall pay the costs of this application."

The first respondent opposed the application and relief sought. In essence, the first respondent argued that, when it was served with this application, it was in the process of finalizing its own lawsuit against the applicant. It intended to ask, among other things, for an order, firstly, cancelling the final judicial management granted on 2 April 2014 and, secondly, granting the first respondent control of the two companies' assets and liabilities with effect from 5 June 2019. It was argued, for the first respondent, that from 5 June 2019, the applicant ought to have relinquished control over both Irazim and Travan and completely disengaged himself from the two companies. The first respondent contends that the applicant is hiding behind outstanding company secretarial

formalities as a way for him to recover judicial management fees from the first respondent. Also submitted was that, some of the assets which the applicant listed are fixtures to the infrastructure/ buildings which are attached to the floors, in concrete and to the walls. Others, such as the motorized hoist, are mounted in concrete whilst things like the water tanks, coal bunkers, and ash bins are themselves of brick and mortar and are also mounted in concrete. More to the point, the first respondent denied that it is liable to pay judicial management fees. Firstly, it queries the sum of US$303,187-32, it argues that it is not clear which tariff was used by the taxing master. The first respondent also submits that the judicial management fees invoice incorrectly records the investment amount as US$10,106,243-89 when only US$5,672,211-11 was invested. Furthermore, he sserts that Statutory Instrument 50 of 2017 empowers judicial managers to recover their expenses and remuneration from the revenues of the company under judicial management. Consequently, disposal of the assets of the two companies in the manner proposed falls outside the provisions of Statutory Instrument 50 of 2017. In the result, the first respondent prayed for dismissal of the application with costs on a higher scale.

At the initial hearing of the matter, with the consent of the parties, I directed the second respondent to file its report addressing the issues raised by the applicant and the first respondent. The report was filed and it recommended that the judicial manager is entitled to the remuneration as taxed and allowed by him. The second respondent noted that the claim was just, reasonable and consistent with section 308 of the Companies Act as well as Statutory Instrument 59 of 2018, and with the agreement of the parties. As the present application had been filed after the repeal of the Companies Act, I also directed the parties to file supplementary heads of argument addressing the effect of the repeal on the proceedings *in casu*.

In its supplementary heads of argument, the first respondent argued that once a statute is repealed; its constituent provisions cease to have any force of law. Reliance was placed on the case of *New Modderfontein Gold Mining Co* v *Transvaal Provincial Administration* 1919 AD 367 at 397, where the court held that if a law professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them. Consequently, the applicant invoked section 307 of the Companies Act [*Chapter 24:03*] which statute was expressly repealed on 13 February 2020 in its entirety by section 303 (2) of the Companies and Other business Entities Act [*Chapter 24:31*].

On the other hand, the applicant argued that the effect of section 17(1) (b) of the Interpretation Act is that the repeal of the old Companies Act did not affect the rights that had been acquired and accrued to the benefit of the applicant as the judicial manager of the two companies. From the supplementary heads, it seems the parties are agreed that the position of the law is to the effect that once a statute has been repealed is repealed; its constituent provisions cease to have any force of law. However, if a party has accrued right under the repealed law, the new law cannot affect the said rights. (See *Vukutu (Pvt) Ltd* v *Kwinje & Anor* 2016 (1) ZLR 1018 (H) at 1031). The question that therefore arises is whether or not the applicant had accrued some rights in terms of the now repealed Companies Act. A legal right is defined as an interest recognized and protected by a rule of legal justice, an interest the violation of which would be a legal wrong, done to him whose interest it is, and respect for which is a legal duty. In light of the above, the applicant has no such right to dispose any of the assets of the two companies and the provisions of section 17 of the Interpretation Act do not aid the applicant's case.

The starting point is s 307 (1) of the now repealed Act which required the applicant to seek leave of the court to dispose of property belonging to Irazim Textiles P/L and Travan Blankets P/L in order to recover fees due to the judicial manager. The aforesaid provision expressly prohibited the judicial manager from selling or otherwise disposing of any of the two companies' assets except in the ordinary course of the company's business. The applicant had to obtain leave of the court to depart from such a prohibition. Thus, the applicant had no right to dispose the assets of the two companies to raise the fees in terms of section 307 of the now repealed Act. I observe that section 307 (3) of the old Companies Act expressly provided that the costs of judicial management *"shall be paid, mutatis mutandis, in accordance with the law relating to insolvency"*.

This means that, since under the defunct legislation, the applicant would have recovered his fees for judicial management in terms of the Insolvency Act, the right applicant was trying to exercise was never exercisable under s 307 (3), aforesaid. Put differently, the applicant cannot claim a right which he never acquired or enjoyed under the repealed law, since payment of judicial management costs depended on the grant of leave by the court. The outcome of an application for leave, depending as it does on judicial discretion, is never predictable. I have no reason to quarrel with the first respondent's argument, and am inclined to dismiss the application for lack of merit. Regarding the costs of suit, it is a settled principle of law that costs follow the event. However, I

am not persuaded to grant costs on a higher scale as I have no reason to doubt that the application, despite failing, was not actuated by bad faith. In the result I make the following order:

1. The cause in HC 1249/20 having been brought in terms of Section 307 of Companies Act [*Chapter 24:03*] after its repeal, this application is hereby dismissed.
2. The applicant shall pay the first respondent's costs.

Wintertons, applicant's legal practitioners
Mutumbwa, Mugabe & Partners, first respondent's legal practitioners