MATTHEW TANGENHAMO CHITAKUNYE

Versus

MASTER OF THE HIGH COURT N.O

And

CLAUDIUS NHEMWA N.O
(In his official capacity as Corporate Rescue Practitioner of Frozenburg (Pvt) Ltd
(Under corporate rescue)

And

FROZENBURG (PVT) LTD

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 4 & 10 JULY 2023

Review application

G. Madzoka for applicant
C.Nhemwa for second and third respondents

CHILIMBE J

BACKGROUND

[1] Two preliminary points were taken from the bar on behalf of second and third respondents. The points intercepted argument in the main application seeking a review of first respondent`s decision in corporate rescue proceedings. The preliminary points raised went thus; -

i) That the applicant had adopted a wrong procedure before first respondent in seeking the removal of second respondent as corporate rescue practitioner. As a result, he was precluded, by that defect, from seeking the review in this court, of the decision rendered by the first respondent and,

ii) That applicant had incorrectly cited second respondent, thereby rendering his review application proceedings before this court a nullity.

[2] These points were opposed by applicant. I will return to them shortly. Meanwhile, the parties will be referred to as follows; - Mr. Chitakunye, (applicant), the Master (first respondent), Mr. Nhemwa[1] or the corporate rescue practitioner (second respondent) and Frozenburg (third respondent).

[3] The background facts are that Mr. Chitakunye, owned a piece of land, Stand 173 Prospect, in Harare. He appointed Frozenburg, a land developer, to facilitate the subdivision and sale of stands on Stand 173.This mandate was given under written contract dated 21 July 2018. Frozenburg failed, according to Mr. Chitakunye, to deliver on obligation.

[4] Frozenburg subsequently went into corporate rescue in terms of the Insolvency Act [Chapter 6;07], ("the Insolvency Act" or "the Act"), in December 2019. Mr. Nhemwa was appointed the corporate rescue practitioner. Mr. Chitakunye therefore pursued Mr. Nhemwa for the unfulfilled obligations of Frozenburg.

[5] But according to Mr. Chitakunye, the corporate rescue practitioner Mr. Nhemwa fared no better. To the extent that three years down the line, no substantial progress had been registered in the original quest to realise value from sale of the stands. On 9 May 2022, Mr. Chitakunye' s present legal practitioners addressed a letter to the Master seeking the removal and replacement of Mr. Nhemwa as corporate rescue manager of Frozenburg.

THE LETTER OF COMPLAINT

[6] Referenced "*Removal*[2] *of Corporate Rescue Practioner: Frozenburg (Private) Limited*" the letter of 9 May 2022 drew the following matters to the Master`s attention; -

i) That Mr. C. Nhemwa be removed from the office of corporate rescue practitioner in terms of section 79 (2) of the Insolvency Act for failure of discharge of duty.

ii) A number of matters were raised to evidence the nature and extent of the alleged dereliction. This included; -the lack of independence, conflict of interest and failure to

[1] "Mr. *Nhemwa*" italicised refers to Mr. Nhemwa as the counsel in these proceedings.
[2] Underlined here and in [5 i)] for emphasis.

engage creditors of Frozenburg in the corporate rescue process. These grounds were raised in addition to the apparent reluctance by Mr. Nhemwa to take remedial action against directors of Frozenburg who had embezzled funds.

iii) It was also argued that Mr. Nhemwa had in fact ceased to meet [namely hold] the requirements of a corporate rescue practitioner prescribed by section 131 (1) (d) of the Insolvency Act.

[7] Mr. Nhemwa, in his capacity as corporate rescue practitioner responded to these complaints in a 10-page letter to the Master dated 27 May 2022. His protestations against the allegations of dereliction raised against him were most ardent. They constituted a comprehensive commentary addressing a wide spectrum of the matters associated with discharge of mandate.

[8] Mr. Chitakunye, unmoved by that fervent response, persisted in his complaints as well as prayer for Mr. Nhemwa` s removal. The Master rendered a verdict on 22 September 2022 dismissing Mr. Chitakunye's motivations for the removal of Mr. Nhemwa. The Master predicated his decision on the following considerations or findings; -

i) That the allegations against Mr. Nhemwa were ("bare allegations") bereft of substance.
ii) That whilst the corporate resuscitation process had taken longer than desirable, removal of the corporate rescue practitioner at that stage would be inimical to the interests of all involved.
iii) That appointment of a new corporate rescue practitioner would take the entire process back.
iv) That in conclusion; - "*On the above basis, it is my finding that the Corporate Rescue Practitioner, Mr. Nhemwa retain his position till the end. It is my humble undertaking that the removal will not do the company as well as other creditors any good. On that note I suggest that the complainants engage with Mr. Nhemwa, so as to come to an understanding in doing so this will help the procedure ending and not dragging it any further than it has already*"

[9] I may mention in passing that it is indisputable that all parties received, responded and disposed of Mr. Chitakunye' s complaint substantively. The purpose of the complaint itself was

clear. It sought ejectment of the corporate rescue practitioner from office. As noted in [7] above, the corporate rescue practitioner spiritedly defended himself. The Master made a ruling on the matter. He dismissed the complaint on the merits. The parties were without a doubt, all of one mind in as far as the nature of the matter that seized their collective interest was concerned.

THE REVIEW APPLICATION

[10] Mr. Chitakunye disagreed with the Master`s findings and verdict of 22 September 2022. He filed this present application seeking a review of the proceedings leading to that decision. The grounds of review were; - that firstly, the Master had committed a gross procedural irregularity by reaching a decision on the matter brought before him without calling the parties for a fuller inquiry.

[11] Secondly, that the Master had demonstrated bias and favour toward Mr. Nhemwa, the corporate rescue practitioner. Lastly, Mr. Chitakunye contended that given the palpable failure of Mr. Nhemwa to discharge the functions of corporate rescue practitioner, the Master`s decision amounted to an insupportably gross irrationality. The substantive relief prayed for was the setting aside of the Master`s decision, removal of Mr. Nhemwa and appointment of a new corporate rescue practitioner.

[12] The application was opposed on essentially the same grounds earlier communicated to the Master on 29 May 2022 by Mr. Nhemwa. Again, I must mention that the opposition to the review application was robustly mounted. No issue was raised at all regarding adoption of an incorrect procedure before the Master.I now revert to the points in limine.

THE IMPUGNED PROCEDURE

[13] Mr. Nhemwa argued that the Insolvency Act; - (i) restricted all attempts (ii) by any third party (iii) intending to cause the Master (iv) to remove a corporate rescue practioner from office, to (v) the procedure set out in section 79 (3) of the Act.

[14] This position was pursued with considerable conviction and ardour by Mr. *Nhemwa* in argument. Mr. Chitakunye ought not have written to the Master as he did. The correct procedure

was for him to file a complaint on affidavit exhorting the Master to remove the corporate rescue practitioner. That is the procedure, according to Mr. *Nhemwa*, set out in section 79 (3) (b) of the Act. It was an inescapable procedural prescription whose neglect by Mr. Chitakunye fatally defeated his suit, so went the argument.

[15] It is necessary to set out in full section 79 of the Act where the bold and or underlined parts are particularly apt; -

> 79 Removal of liquidator [3]from office by Master
>
> **(1) The Master must remove a liquidator from office—**
>
> (*a*) if he or she was not qualified for appointment as liquidator or if his or her appointment was unlawful;
>
> (b) if the majority in value and the majority in number of the creditors who have proved claims against the estate—
>
> (i) have requested the Master in writing to do so; or
>
> (ii) have at a meeting of creditors of the estate, after notice of the intended resolution was given, resolved that the liquidator must be removed from office;
>
> (*c*) if he or she resigns from the office of liquidator;
>
> (*d*) if he or she is temporarily absent from Zimbabwe for a period longer than 60 days without the permission of the Master, or contravenes any conditions set by the Master when he or she gave permission;
>
> (*e*) if after his or her appointment he or she becomes disqualified from being a liquidator.
>
> (2) **The Master may remove a liquidator from office** on the ground that he or she has failed to perform satisfactorily any duty imposed upon him or her by this Act or has failed to comply with a lawful demand of the Master.
>
> (3) **The Master may suspend a liquidator from office** and appoint an interim liquidator if necessary for the preservation of the costs of the estate pending the outcome of an investigation—
>
> (*a*) if the liquidator has been charged with committing an offence; or

[3] "*Liquidator*" in this instance, is synonymous with "*corporate rescue practitioner*" as per section 132 of the Insolvency Act.

(*b*) **if the Master has received a complaint <u>on affidavit;</u> or**

(*c*) if evidence given at an examination in terms of section 57, 58 or 60, or written answers in terms of section 59 justifies a suspension.

THE IMPORT OF SECTION 79 (3) (b) OF THE INSOLVENCY ACT

[16] The bold and underlined portions of section 79 are clear. In the simplest of terms, section 79 (1) stipulates the grounds upon which the Master *must remove* a corporate rescue practitioner from office. Section 79 (2) grants the Master a discretion (*he may*) to remove a corporate rescue practitioner from office for dereliction or failure to comply with the Master`s lawful directive.

[17] This section is particularly important to the points in limine raised. It extends discretion to the Master to act once a certain set of facts are fulfilled. The section states not prescribe how, or by whom, such facts or circumstances shall be placed before the Master.

[18] Thirdly, section 79 (3) empowers the Master to *suspend* a corporate rescue practitioner as part of remedial action to avert further prejudice to the troubled entity or interested parties. The Master may be prompted into taking such measures by a complaint against the conduct or suitability of a corporate rescue practitioner. This is the procedure provided for by 79 (3) (b). It is the procedure with which Mr. *Nhemwa* appeared quite enamoured.

[19] But it appears that counsel missed the essence of the guidance in section 79 (3) (b) by a long mile. I was thus puzzled by his interpretation of this provision. This section prescribes the procedure, not for the <u>removal</u>, but for the <u>suspension</u> of corporate rescue practitioner. It matters not, that such suspension may ultimately result in removal. Section 79 (3) (b) deals <u>primarily with suspension</u>, and <u>secondarily with removal</u>.

[20] Mr. Chitakunye did not approach the Master seeking the suspension of the corporate rescue practitioner. He moved the Master to *discharge t*he corporate rescue practitioner from office. This distinction between suspension and dismissal becomes most apparent from a reading of the rest of section 79. Suspension may entail a longer route toward the removal of a corporate rescue practitioner from office.

[21] Nonetheless, the fact remains (as noted in [9] above] that the Master declined to remove Mr. Nhemwa. And in doing so, he did not find it necessary advert to matters of procedure. (Nor did Mr. Nhemwa in his most detailed response). The Master delved into it. He rendered a decision substantively on the complaint seeking the removal of Mr. Nhemwa as corporate rescue practitioner. The question that arises is; - does the Insolvency Act insulate the Master`s decision from scrutiny by this Court under the exercise of its powers of review?

WHEN IS THE MASTER`S DECISION REVIEWABLE BY A "COURT"[4] IN TERMS OF SECTION 191 OF THE INSOLVENCY ACT?

[22] That was the secondary argument by Mr. *Nhemwa.* He submitted that section 191 of the Insolvency Act only permitted a review of decisions by the Master in *liquidation* and not *corporate rescue* proceedings. Again, counsel was emphatic on this point. Again, I was rather perplexed by the forcefulness. The answer to the question as to whether the Master`s decision is reviewable in the present circumstances is a firm and positive *yes.* Section 191 itself say so; -

> 191 Review
>
> (1) **Any person aggrieved by any decision, order or taxation of the Master** or by a decision by the liquidator or by a decision or order of an officer presiding at a meeting of creditors of an insolvent estate, including the liquidator, **may,** within 90 days or such further period as the Court may allow for good cause shown, **bring such decision, order or taxation under review by the Court** upon notice to the Master, liquidator or the presiding officer as the case may be and to any other person whose interests are affected.

[23] The wording highlighted in bold above sets out, in no uncertain terms, a party`s right to a review of a Master`s decision. On the basis of the above, the first point in limine collapses. I will resist the invitation by Mr. *Madzoka* (for the applicant) to opine deeper on the points in limine. He had challenged the competency and propriety of raising points in limine.

[4] "Court" as defined by section 2 of the Insolvency Act means the High Court, and in certain specified instances, the Magistrates Court.

[24] He argued that the respondents had effectively abandoned the positions taken in the pleadings. And that abandonment had not, as ought to have been the case, been preceded or accompanied by formal amendment or withdrawal of pleadings. Counsel cited, in that regard, *Ministry of Agriculture and Lands v de Klerk & Ors* 2014 (1) SA 212 and *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Analysis (Pvt) Ltd* 2018 (1) ZLR 449.

[25] Mr. *Madzoka* had further argued that the points in limine were effectively points of law which stood to prejudice Mr. Chitakunye the applicant. In that regard, they offended the guidance and principles set out in *Muchakati* v *Netherburn Mine* 1996 (1) ZLR 153 (S) and similar decisions. With the collapse of the first point in limine, I find it unnecessary to wade into that discourse.

CITATION OF SECOND RESPONDENT, CLAUDIUS NHEMWA N. O[5]

[26] Mr. *Nhemwa* argued, as his second point, that the failure by Mr. Chitakunye the applicant, to cite second respondent in a personal capacity rendered the proceedings fatally defective. In particular, the draft order sought was incompetent because it ran the risk of turning into a supine *brutum fulmen*.

[27] In dealing with this point, one must briefly examine the relationships between the parties. I find it quite difficult to do so without narrating the relationships concerned in the cumulative style of that old English nursery rhyme; - *"This is the House that Jack Built".*

[28] The narration goes thus and the punctuation is deliberate;- Mr. Claudius Nhemwa is a legal practioner who has claimed separate legal personality from C. Nhemwa and Associates; this being the sole practice run by the very same Mr. Claudius Nhemwa; which law firm acted for an entity known as Frozenburg, which Frozenburg had entered into in a Land Development Contract with applicant; being the transaction during whose currency Frozenburg found itself placed under corporate rescue; which corporate rescue proceedings saw Mr. Claudius Nhemwa-the same legal practitioner and sole partner - being appointed the corporate rescue

[5] (In his official capacity as Corporate Rescue Practitioner of Frozenburg (Pvt) Ltd (under corporate rescue)

practitioner of Frozenburg; which Frozenburg and Mr. Claudius Nhemwa N.O have now been sued, together with the Master, under the present review proceedings and appear as litigants; the same litigants who are both represented by Mr. Claudius *Nhemwa* as its, and his legal practitioner respectively.

[29] It is not necessary to unpack the above relationships any further. I do recognise however, that Mr. Nhemwa' s conduct has been besmirched in each and every capacity that he has acted as outlined above. The latest being that as the counsel representing the second and third respondents herein, he has raised in these proceedings, baseless points in limine. I have reiterated that Mr. Nhemwa' s recriminations against all the allegations raised against him (in his various capacities), have been persistently emphatic.

[30] Additionally, the relationships issuing from the above scenario are intertwined. They revolve around the very personage of Mr. Nhemwa. The relationships are analogous to the situation of a bird upon a tree. It may flit from bark to bough, or from bole to branch. It still remains, in all that, the same bird about the same tree.

[31] I thus laboured to establish, at the very least, how the citation of Mr. Nhemwa- the corporate rescue practitioner, in his official capacity, in proceedings seeking his removal, could possibly be deemed as fatally defective. Importantly, Mr. *Nhemwa* did not explain why the N.O reference only created a defect in so far as it applied to Claudius Nhemwa N.O, and not The Master N.O, given the principle behind his argument.

[32] Further, the alleged mis-citation of second respondent did not raise the usual (and fundamental) argument that applicant cited a non-existent party. See *Sindikumbuwalo Pacifique v The Commissioner General Department of Customs and Excise* HH 137-18. In *Edmore Mapondera & 55 Others v Freda Rebecca Gold Mine Holdings Limited* SC 81-22, the Supreme Court per BHUNU JA cautioned on the most critical matter to consider when dealing with the citation of parties sating as follows [at 26] that; -

> "Generally speaking, it is undisputable and a matter of trite elementary law that one cannot sue a non-existent person. In the leading case of *Gariya Safaris (Pvt) Ltd v van Wyk* **[1996 (2) ZLR 246 (H]** the High Court had occasion to remark that: *"A*

> *summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void ab initio.""*

[33] Nor has it been argued that applicant cited a party completely unconnected with the subject matter or dispute. Secondly, in *Mapondera v Freda Rebecca*, (supra), the Supreme Court deplored the obsession with excessive legalese and urged adoption of a robust approach. BHUNU JA held thus at [24]; -

> "It is therefore clear from the authorities that the primary function of the court *a quo* is to do simple justice between the parties without dwelling too much on legal technicalities. It is also self-evident that the general courts of law are beginning to mellow and drift towards the idea of correction of simple procedural errors in order to do real and substantial justice."

[34] As submitted by Mr. *Madzoka*, if the defect lay in the draft order, then surely such could be cured prior to its issuance? After all, it was but a draft. That submission finds favour. The second ground is also unsustainable and must therefore fail.

DISPOSITION

It is hereby ordered that the points in limine raised on behalf of second and third respondent be and are hereby dismissed with costs.

Coghlan, Welsh and Guest -applicant`s legal practitioners
C.Nhemwa and Associates-second and third respondents` legal practitioners

[Chilimbe J **10/07/23]**