REIGN LOGISTICS (PRIVATE) LIMITED
versus
ALEXIOUS MASHINGAIDZE DERA
and
DERECK CHIKURA
and
WESTWOOD INDUSTRIAL (PRIVATE) LIMITED
and
MASTER OF THE HIGH COURT
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 7 & 22 February 2024

Urgent Chamber Application

F Nyangani, for the applicant
C Nhemwa, with *C T Nhemwa*, for the first & third respondents
B Ngwenya, with *G Mucheti*, for the second respondent

ZHOU J: This is an urgent chamber application for a provisional order interdicting the first respondent from performing his duties as Corporate Rescue Manager for the third respondent and for him not to interfere with the business operations of the third respondent. While the interim interdict herein is being sought pending the return date, the confirmation of the provisional order is being sought pending determination of an application instituted by the applicant under case no. HCH 587/24. In HCH587/24 the applicant herein is seeking the setting aside of the first respondent's appointment and his removal as Corporate Rescue Manager of the third respondent.

The application is opposed by the first, second and third respondents. In addition to opposing the matter on the merits the respondents advanced the following objections *in limine*: (a) that the matter is not properly before the court on account of the applicant's failure to notify affected persons in terms of the relevant provisions; (b) that the applicant has no *locus standi* to institute the instant application; and (c) that the matter is not urgent. It is appropriate to consider

the question of urgency first as its determination has a bearing on whether or not the other matters raised will be considered on an urgent basis.

Urgency

The objection to the urgent hearing of the matter is based on the allegation that the applicant was aware of the facts upon which this application is founded as long ago as 2023. In this respect, the respondents ascribe to the applicant alleged knowledge by a person who is said to be applicant's General Manager, one Nathan Mnaba, about the allegations upon which the application is founded.

A matter is urgent if it cannot wait to be dealt with as an ordinary application. See *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Jopa Engineering Company (Pvt) Ltd* HH 16-98 at p1; Pickering v Zimbabwe Newspapers (1980) Ltd (1) ZLR (H) at p 93. This court has held that a party who institutes proceedings on an urgent basis is essentially seeking preferential treatment from the court in terms of being permitted to jump the queue of other cases waiting to be dealt with as ordinary applications. For that reason, the court expects such a party to have acted expeditiously in instituting the application from the time that he or she becomes aware of the need to act. Urgency which results from deliberate inaction until the arrival of the day of reckoning has been held not to be the urgency that the rules envisage. See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H) at p 193 F – G.

The second respondent refers to alleged knowledge of the facts by the applicant's general manager but attaches no evidence to prove such knowledge. A copy of a business card does not prove such knowledge. The other document relied upon by the respondents is communication from Collen Rose who has not been alleged to be associated with the applicant. Instead, that communication seems to have been written on behalf of the third respondent. The submission that the matter is not urgent is therefore not supported by the facts alleged and the evidence tendered.

The averments in the opposing affidavit filed on behalf of the first and third respondents that the applicant failed to act expeditiously after becoming aware of the cause of complaint on 17 January 2024 was not persisted with in argument. 17 January 2024 was the day on which the creditors' meeting was held. That objection would, in any event, not be sustainable. The application was filed on 31 January 2024, about fourteen days from the date of the creditors' meeting. There is no delay such as would deprive the matter of its urgency.

Accordingly, the objection to the urgent hearing of the matter is dismissed.

Whether the applicant has *locus standi*

The respondents' ground of objection to the locus standi of the applicant is that it has no claim that has been accepted by the first respondent. It was accordingly argued that the applicant was not a creditor and had no legal standing to institute the application.

The principles applicable in determining whether a party has locus standi to institute or defend proceedings are settled. These were articulated by EBRAHIM J (as he then was) in the case of *Zimbabwe Teachers Association & Ors* v *Minister of Education* 1990 (2) ZLR 48(H) at 52F-53E, as follows:

> "It is well settled that, in order to justify its participation in a suit such as the present, a party . . . has to show that it has a direct and substantial interest in the subject matter and outcome of the application. In regard to the concept of such a 'direct and substantial interest, CORBETT J in *United Watch & Diamond Co. (Pty) Ltd and Others v Disa Hotel Ltd and Another* 1972 (4) SA 409(C) quoted with approval the view expressed in *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151((O) that –
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> > '. . . an interest in the right which is the subject-matter of the litigation and . . . not thereby a financial interest which is only an indirect interest in such litigation.'"

The authorities show that a direct and substantial interest must be a legal interest in the subject matter of the proceedings which can be affected adversely by the judgment of the court in the matter concerned.

The applicant *in casu* alleges that it is a creditor, that it is owed money by the third respondent. The corporate rescue proceedings do affect that interest insofar as they pertain to the management of the company. The mere fact that the applicant's claim has not yet been accepted is irrelevant. The test is whether, if the applicant ultimately succeeds in proving its claim it would be entitled to any relief in respect thereof. That is what gives the applicant legal interest and clothes it with the locus standi to institute the proceedings. Consequently the objection to the applicant's *locus standi* is dismissed.

Whether the application is invalid by reason of the failure to give notice to affected persons

The objection by the respondents is that the applicant has not given notice of the instant application to affected persons. In this regard, reliance was placed on the provisions of s 123 of the Insolvency Act [*Chapter 6:07*]. That section has no application to an application to stop a corporate rescue manager from performing his functions pending determination of an application for his removal. The respondents are in essence asking the court to read into the statute what is not there in order to accommodate the facts of the present case.

For these reasons, the objection must fail.

The merits

The instant application is for an interim interdict to stop the first respondent from performing his functions pending the determination of the application for his removal. The requirements for such an interdict are settled. They are:

(1) That the right which is sought to be protected is clear; or

(2) That (a) if it is not clear, it is *prima facie* established though open to some doubt, and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing the right;

(3) That the balance of convenience favours the granting of interim relief; and

(4) The absence of any other satisfactory remedy.

See *Nyambi & Ors* v *Minister of Local Government & Anor* 2012 (1) ZLR 559(H) at 572C-E; *Econet (Pvt) Ltd* v *Minister of Information* 1997 (1) ZLR 342(H) at 344G-345B; *Watson* v *Gilson Enterprises & Ors* 1997 (2) ZLR 318(H) at 331D-E; *Nyika Investments (Pvt) Ltd* v *ZIMASCO Holdings (Pvt) Ltd & Ors* 2001 (1) ZLR 212(H) at 213G-214B.

In this case the main matter seeks the removal of the first respondent from being the corporate rescue manager of the third respondent on the grounds that he is conflicted by the interest arising from his previous association with the company under corporate rescue. In order to appreciate what constitutes an interest such as would disqualify one from holding that critical position, it must be understood that the corporate rescue procedure is designed to provide struggling businesses with a lifeline to recover from financial distress and thereby avoid the drastic consequence of liquidation. The corporate rescue practitioner is appointed to superintend over the rescue process. He is enjoined to develop a corporate rescue plan and ensure its successful implementation. The plan is the strategy to rehabilitate the company. In that capacity he is the one in control of the affairs of the distressed business entity's operations and affairs with the clear mandate to salvage the company from its precarious situation.

Section 123(a)(b) of the Act authorizes the setting aside of the appointment of a corporate rescue practitioner on the grounds that he is not independent of the company or its management. In terms of s 131 of the Act a person is qualified for appointment as a corporate rescue practitioner if, *inter alia,* if he does not have any relationship with the company such as would lead a reasonable

and informed third party to consider that the integrity, impartiality or objectivity of the person is compromised by this relationship or where the person is not an associate of a person who has a relationship that is compromised by the foregoing factors. In this case evidence has been tendered to show that the first respondent was involved in the financial affairs of the third respondent. Correspondence produced shows that the first respondent was being copied documents pertaining to the financial affairs of the company. The extent of his involvement in the financial affairs is irrelevant in the face of that documentary evidence, as the test for determining whether he is compromised is not subjective but objective. As the Act provides, the test is that of a reasonable and informed third party, not the subjective views and attitudes of the person whose appointment is being impugned.

There is therefore clear evidence of the first respondent's involvement with the affairs of the company for which he was appointed corporate rescue practitioner.

The submission made on behalf of the first respondent, a very startling submission indeed, was that he did not know why the correspondence was being copied to him. He further submitted that his business partner was the one who was involved in the financial affairs of the third respondent. His mere association with the company and/or a person who is involved with the company disqualifies him. A reasonable and informed third party with the knowledge of the facts established would not accept that the first respondent is not compromised. The facts disclose that he is compromised.

The right which the applicants seek to vindicate in the main action is therefore clearly established. If not clearly established, certainly there is *prima facie* proof of the right to have the first respondent removed which proof is in the form of the documents produced and the admitted facts.

The reasonable apprehension of irreparable harm arises from the mere fact of a disqualified person having to continue to hold the strategic position of corporate rescue practitioner in respect of a company wherein he has an interest. That prejudice is irremediable in that if the appointment of the first respondent is ultimately set aside his acts and consequences thereof will not be easy to undo.

The balance of convenience favours the granting of the interim relief. By being associated with the financial affairs of the third respondent, it is not far-fetched to perceive the financial

advisors as part of the problems of the third respondent which have necessitated its placement under corporate rescue. It is not envisaged that the first respondent would be able to render any better or fresh advice to the company now merely because he has been appointed to manage the corporate rescue process. On the other hand, there is no prejudice that is irreparable that will be suffered by any of the respondents if the first respondent is temporarily interdicted from performing the work.

There is no alternative satisfactory remedy that would afford the applicant the relief that is being sought herein. Indeed, none of the respondents postulated the existence of such an alternative remedy.

The applicant has therefore established a solid case for the granting of the relief sought.

In the result, **IT IS ORDERED THAT**:

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The provisional order be and is hereby confirmed.
2. The first respondent be and is hereby ordered to stop managing the affairs of the third respondent pending the determination of the application in case no. HCH 587/24.
3. The first and second respondents shall pay costs.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is granted the following relief:

1. The first respondent be and is hereby ordered to stop exercising his duties as corporate rescue manager for the third respondent and not to interfere with the business operations of the third respondent in any way.

SERVICE OF PROVISIONAL ORDER

The applicant's legal practitioners are granted leave to serve this provisional order upon the respondents.

Nyangani Chambers, applicant's legal practitioners
C Nhemwa & Associates, first & third respondent's legal practitioners
B N Ngwenya Legal Practice, second respondent's legal practitioners