OFER SIVAN
versus
ALEXIOUS DERA N.O.
and
GILAD SHABTAI
and
MUNYARADZI GONYORA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 10 December, 2021 and 12 January, 2022

Urgent Chamber Application

Advocate T.N. Nyamakura for the applicant
R. Dembure for the 1st respondent
Advocate L.K. Mapuranga for the 2nd and 3rd respondents
No appearance for the 4th respondent

WAMAMBO J: The applicant was on 29 November, 2021 granted a provisional order by MUSITHU J in case number HC 5436/21 (judgment ref HH 668/21) in an urgent application which the applicant had filed against the respondents herein, seeking relief as set out in the provisional order filed therewith. The provisional order which the applicant sought was couched as follows:-

"***INTERIM RELIEF GRANTED***

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

1. *The operation of a resolution executed by the first and second respondent dated 1st October, 2021 authorising the placing of Adlecraft Investments (Private) Limited under voluntary business rescue proceedings is suspended.*

2. *The respondents are interdicted and restrained from implementing the terms of that resolution.*

TERMS OF THE FINAL ORDER SOUGHT

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

IT IS HEREBY ORDERED THAT

1. *The resolution dated 1st October, 2021 attached to this application marked "E" endorsed under CRP 3/21 is null and void.*

2. *Adlecraft Investments (Private) Limited has only issued 20 shares, all of which are currently owned by the applicant as 100 % shareholder.*

3. *Consequent to the above declaration the following consequential relief will be sought.*

   3.1 An order setting aside the resolution dated 1st October, 2021 under CRP 3/21.

   3.2 An order setting aside the appointment of fourth respondent as corporate rescue practitioner.

   3.3 An order interdicting and restraining the first respondent from representing himself out to the public or transacting on the perjured capacity of a holder of equity in Adlecraft Investments (Private) Limited.

   3.4 The first and second respondents are ordered to pay the applicant's costs on an attorney and own client scale."

The provisional order granted by MUSITHU J appears on the last page of his judgment HH 668/21. The operative part of the order reads as follows:-

"*Resultantly it is ordered that:*

Pending the determination of this matter on the return date the applicant is granted the following interim relief:-

1. *The operation of the circular resolution executed by the first and second respondents dated 1 October, 2021 authorising the placing of Adlecraft Investment (Private) Limited under voluntary business rescue proceedings is suspended.*

2. *The respondents are hereby interdicted from implementing the terms of the resolution."*

The first, second and fourth respondent were dissatisfied with the whole judgment of MUSITHU J. They noted appeals in the nature of a combined notice of appeal in respect of the second and third respondents herein and the other notice of appeal in respect of the first respondent. The appeals are pending in the Supreme Court respectively as case numbers SC 462/21 and SC 463/21. They were filed on 30 November, 2021. The applicant consequent on the filing of the two appeals filed this application on 6 December, 2021.

The applicant prays for leave to execute MUSITHU J's judgment number HC 668/21 pending the determination of the appeals. The details of the order sought by the appellant is set out in his draft order on pages 73 – 74 of the application as follows:-

"*1. The application by the applicant for leave to execute the judgment of this Honourable Court granted on 29 November, 2021 as judgment number HH 668/21 pending the appeal against the judgment noted by the respondents under SC 462/21 and SC 463/21 be and is hereby granted.*

2. Consequently it is directed that the applicant be and is hereby granted leave to carry the judgment of this court in HH 668/21 into execution notwithstanding the appeals against it by the respondents.

3. This order will lapse upon final conclusion of whichever appeal is determined first between SC 462/21 and SC 463/21

4. The costs of this application shall be paid by the respondent who apposes the application on the basis of costs following the cause. In the event that more than one respondent opposed the application, then costs shall be borne jointly and severally, the one paying the other(s) to be absolved."

In respect of the filed notices of appeal the grounds of appeal in case number SC 462/21 are stated as follows:-

"The court a quo erred at law by:-

1. *Granting relief to the first respondent when such relief was unavailable to him as he lacked standing to sue for such relief since he is not a shareholder in the company over which he claimed relief and his status as a director did not grant standing.*

2. *Granting an interdict against conduct which was lawful and which was taken pursuant to statutory authority.*

3. *Granting an interdict based on a non-existent cause of action as the Insolvency Act [Chapter 6:07] provided for the specific circumstances in which the court could intervene and the circumstances of this cases was one such.*

4. *Granting relief to the first respondent whose application was beset by apparent and material falsehoods regarding the first respondent's shareholding in the company over which he sought to assert rights.*

5. *Finding that the interim relief sought could be granted even in the face of material falsehoods in the application because the material falsehoods became relevant on the return date.*

6. *Granting an interdict which interfered with the internal affairs of the company on a matter involving what was a ratifiable wrong.*

7. *Finding that the first respondent had shown a prima facie violation of section 196 of the Companies and Other Business Entities, Act [Chapter 24:31] where it had been shown that there was compliance with this provision of the law by the applicant".*

In respect of case number SC 463/21 the grounds of appeal were stated as follows:-

"*1. The court a quo erred at law and grossly misdirected itself when it found contrary to the evidence on record that the 1st respondent had not approached the court with dirty hands.*

2. The court a quo erred at law and grossly misdirected itself in failing to find as it ought to have done that, it could not afford 1st respondent the relief he sought since such relief fell outside the scope of the remedies available in terms of section 132 and 123 of the Insolvency Act [Chapter 6:07].

3. The court a quo erred at law and grossly misdirected itself in failing to appreciate that without setting aside the certificate of appointment issue in favour of the appellant by the Master of High Court, any interdict granted against appellant would be null and void ab initio.

4. The court a quo erred at law and grossly misdirected itself in its adjudicative process when it held that 1st respondent had established a prima facie case entitling him to the interdictory relief that he sought.

5. A fortiori the court a quo erred at law and grossly misdirected itself when it held that the corporate rescue proceedings a quo were premised on the assumption that the resolution founding the process was validly passed, yet such a final and definitive finding could only be made on a balance of probabilities and not a prima facie case".

The respondents opposed this application. At the hearing on 10 December, 2021 the parties legal practitioners made brief oral submissions where after it was agreed by the parties that they would file heads of argument. The application would then be determined on the filed papers. It is

convenient to first briefly outline the law and the court's approach to the determination of an application for leave to execute pending appeal. I will then consider the facts of the case and relate them to the law in determining the application.

The law and the courts approach to such an application are settled matters. Counsel for the parties in their heads of argument cited various authorities which include the following:-

- *Dabengwa & Anor v Minister of Home Affairs* 1982 (1) ZLR 223;
- *Jeremy Prince (Pvt) Ltd* v *Owen and Anor* HH 14/86;
- *Van T. Hoff* v *Van T. Hoff & Ors* 1988 (1) ZLR 335 (H)
- *Net One Cellular (Pvt) Ltd* v *Net One Employees & Anor* 2005 (1) ZLR 275 (S) at 281 A – D

In this regard, the case of *ARTUZ* v *ZANU PF* HMA 37/18 discusses the law and court's approach in depth.

In the case of *Jonga* v *Chabata & Anor.* HH 276/2017 CHATUKUTA J (*as she then was*) aptly noted the law and court's approach as set out in the authorities as follows at page 3 of the cyclostyled judgment;

> '*Turning to the merits of this application, the parties are agreed that it is trite that the noting of an appeal has the effect of suspending the operation of the judgment appealed against. Such judgment can only be executed with the leave of the court that granted it. The main guiding principle for the court in determining such an application is to grant leave where real and substantial justice requires such leave or conversely, where injustice would otherwise be done if leave is not granted. The court would also have regard to the prospects of success on appeal; the potentiality of irreparable harm or prejudice to the applicant of leave is not granted, the potentiality of irreparable harm to the first respondent if stay (sic) (it should be 'leave') and where there is the possibility of irreparable harm to both parties, the balance of hardship or inconvenience ..... see also Zimbabwe Mining Development Corporation v African Resources PLC & Ors. 2010 (2) ZLR 34 (S); Kawa v Musenda & Ors. HB 108/14; Founders Building Society v Mazuka 2000 (1) ZLR 528 and Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd 1998 (1) ZLR 149 (HC) 154 H".*

From the judgment appealed against HH 668/21 read together with the judgment on points in limine number HH 650/21, the scenario which emerges is to all interests and purposes a battle for control of the company Adlecraft Investments (Pvt) Ltd. The battle is between the applicant and his co-directors, namely the second and third respondents. The first respondent fight is a different one. He was appointed by the fourth respondent to act as the corporate rescue practitioner for Adlecraft Investments (Pvt) Ltd. following the passing of a circular resolution for placement of the company under voluntary corporate rescue allegedly passed by the second and third

respondents in their capacity as directors of Adlecraft Investments (Pvt) Ltd. The validity of the circular resolution was challenged by the applicant. The first respondents fight was to persuade the court to hold that his appointment as the corporate rescue practitioner was regular and should not be set aside. Ultimately, the principal issue which MUSITHU J had to decide was whether or not the applicant had on his papers established a *prima facie* case for the relief sought.

In regard to the determination of MUSITHU J, the learned judge acted in terms of the provisions of rule 60(9) which provides as follows:-

> *"(9) where in an application for provisional order the judge is satisfied that the papers establish a prima facie case he or she shall grant a provisional order either in terms of the draft filed or as varied".*

The question whether or not MUSITHU J. made an error on law, fact or both in holding that the applicant's papers established a *prima facie* case and consequently granting the provisional order is ultimately what the Supreme Court would have to determine. In terms of the quoted sub rule aforesaid, the judge is obliged to grant the provisional order as sought or as varied once the judge is satisfied that the applicant's paper establish a *prima facie* case. Therefore in considering the proposed grounds of appeal, I must consider whether there are any prospects that the Supreme Court will find that MUSITHU J. was misdirected to find that a *prima facie* case was established on the applicant's papers. If the learned judge was not misdirected, then the proposed appeals have no prospects of success. This fact would then have to be considered together with other factors as already set out herein.

The facts of the matter as set out by MUSITHU J. in both judgments HH 650/21 and HH 668/21 would appear not to be in dispute amongst the parties herein. The learned judge summarized the facts as that the applicant claimed to be the director of Adlecraft Investments (Private) Ltd as well as its sole shareholder. On the other hand the second respondent herein claimed to be the majority shareholder of the company through a company called Adlecraft Holdings (Pvt) Ltd which held all the shares in Adlecraft Investments (Pvt) Ltd. The second respondent claimed to be the sole director of the share holding company and by extension the majority shareholder in Adlecraft Investments (Pvt) Ltd.

The learned judge found that the second and third respondents claimed that the correct shareholding of Adlecraft Investments (Pvt) Ltd as at 29 August, 2018 excluded the applicant. They averred that the shareholding was as follows:-

(a) Adlecraft Holdings (Pvt) Ltd – 49%

(b) Munyaradzi Gonyora (third respondent herein) – 10%

(c) Razaro Mapuwapuwa – 10%

(d) Stephen Itai Mangoda – 10%

(e) Chance Chitima – 10%

(f) Adlecraft Workers Trust – 11%

The second and third respondents claimed that the above shareholding structure was the one furnished to the Zimbabwe Investment Authority and thus was the correct shareholding of the company. The second and third respondents therefore disputed on that piece of evidence the applicant's claim that he was the sole shareholder of Adlecraft. The learned judge also noted that the extant CR 14 listed four directors, namely the applicant, second and third respondents herein and one Claudius Nhemwa. The learned judge also noted that no CR 2 form was produced to confirm the shareholding of the applicant.

Significantly, MUSITHU J. stated as follows on page 5 of judgement HH 668/21

'*First and second respondents further claimed that a shareholders dispute existed between the parties. It had the potential to cause serious financial harm and for that reason there was need to entrust an independent third party with the affairs of the company to avoid further financial review. The applicant was allegedly running down the company. As the managing director, he had failed to repay the loans advances to the company.*

First and second respondents averred that the application was ill conceived as the corporate rescue process was under way. The court could not interdict a lawful process that was intended to save the company. More importantly the third respondent and the registrar of companies had accepted the resolution. The resolution was passed by the majority directors. The resolution was therefore not afflicted by any illegality as alleged. The court was urged to dismiss the application with costs on the legal practitioner.

Fourth respondent's case:

Following the dismissal of its preliminary points, Mr Sithole for the fourth respondent advised that he would be abiding by the papers already filed of record. The fourth respondent insisted that his appointment as corporate rescue practitioner was confirmed by the third respondent through a certificate of appointment of 6 October, 2021. The grounds of his removal from his position were confined to those prescribed under section 132 of the Insolvency Act. At the time the applicant deposed to the founding affidavit, he was no longer a director of the company by virtue of section 130(2) of the Insolvency Act.

The existence of a shareholder dispute necessitated the placing of the company under corporate rescue whilst the parties resolved their differences. The applicant had refused to co-operate with the corporate rescue practitioner. The fourth respondent prayed that the application be dismissed with costs on a higher scale".

After setting out positions of the parties the learned judge on page 6 – 10 of judgment HH 668/21 considered the submissions of the parties. He noted that the second and third respondents herein had applied to produce a supplementary affidavit, to which they attached a shareholders agreements and share certificates allegedly signed by the applicant. The documents were retrieved from the Zimbabwe Investment Authority. The documents were retrieved by the first respondent herein from the Zimbabwe Investment Centre. The purpose of producing the documents was intended to show that the applicant lied about the shareholding status of the company in his founding affidavit when he deposed that he was the 100% shareholder of Adlecraft Investments (Pvt) Ltd.

The learned judge noted that the applicant's response to the documents from the Zimbabwe Investment Authority was that the issue before the court concerned the applicant's status as a director and not shareholder of Adlecraft Investments (Pvt) Ltd because it was a director's disputed resolution which placed the company into voluntary business rescue. The court had to decide whether the disputed directors' resolution was valid or not. The applicant averred that section 196(1) of the Companies and Other Business Entities Act [*Chapter 24 – 31*] was not complied with. The applicant averred that he was entitled to notice of the meeting of directors and to participate in the deliberations which resulted in the resolution to place the company under voluntary co-operate rescue. It was the applicant's case that on the fact of it, section 196(1) of the Companies and Other Business Entities Act required that all directors of the company should participate in the making of the resolution as was reached in this case. The applicant averred that the court could well hold the resolution to be invalid and set it aside on the return date. The applicant averred that he was not given notice of the meeting and did not participate in the meeting. The applicant also submitted that there was no evidence of financial distress of the company pleaded by the second and third respondents as would have necessitated the placement of the company under corporate rescue in terms of the Insolvency Act [*Chapter 6:07*]. Applicant averred that no accounts were placed before the court to back up the claim that the company was in financial distress.

The applicant averred that the second respondent was not a shareholder of Adlecraft Investments (Pvt) Ltd. The second respondent was alleged to have lent money to the company. He was thereafter appointed as a non-executive director to safeguard his financial interest in the company. The applicant averred that the loan had been partly paid and that the second respondent had never participated in the management of the company's affairs.

The next development as set out by the applicant and recorded by the learned judge was the making of a circular resolution of directors dated 1 October, 2021. The content of the resolution was recorded in the judgment as was the applicant's response to it. In brief the resolution focussed that the company would "*likely experience financial distress within the next six (6) months arising from the shareholder disputes which have spilled into the courts of law and are crippling the company's operations* ....". The resolution then noted that the company had reasonable prospects of being rehabilitated successfully if placed under corporate rescue since the company had assets and business which if utilised properly would restore the company to a going concern status. The resolution appointed the first respondent herein as corporate rescue practitioner and the third respondent as the one to depose to a sworn statement on the company's behalf on the status of the company as required by the operative provision of the Insolvency Act.

The applicant averred that he received the circular resolution by e-mail on 2 October, 2021. He was not given prior notice of the meeting which resulted in the resolution. He was not consulted by the second and third respondents on the issues arising from the resolution and did not therefore provide any input in the making of the resolution. He protested in his response to the resolution that the second and third respondents were acting in bad faith because they had purported to negotiate the settlement of a related case HC 4465/21 whilst at the same time engaging in the issue of corporate rescue without the knowledge of the applicant. The applicant indicated that the resolution had no legal basis. Further the applicant indicated that the company had no challenges which called for its placement under corporate rescue.

The applicant as noted by the learned judge on page 4 of judgment number HH 668/21 contended that the circular was irregular as no meeting was held. He noted that the resolution was not signed by all directors as required by law in circumstances where a formal meeting is dispensed with. The applicant contended that the company's articles of association did not provide for circular resolutions.

The learned judge also noted the submission by the applicants counsel that section 196(i) of the Companies and Other Business Entities Act, required that each director should participate in the meeting called to deliberate on placement of the company under corporate rescue.

The learned judge noted the submission made by the second and third respondents that the applicant had stated material falsehoods. These related to the applicant deposing to facts which were inconsistent with documents retrieved from the Zimbabwe Investment Authority. The learned judge took note of the submission further made that because the applicant had told material lies in his affidavit he ought to be denied the relief which he sought. The learned judge further noted the submission made that the applicant had declined to sign the resolution and the court should not intervene unless the wrong committed was not ratifiable. Counsel's contention that the applicant could still be outvoted on ratification of the omissions was noted by the learned judge. The learned judge also noted the second and third respondents' submission that the non-compliance with the law was immaterial because the resolution would still have been passed by a properly constituted directors meeting. The learned judge also took note of the submission that the applicant ought to have brought his challenge as a derivative action because as a director he was disqualified from acting as director because of the corporate rescue status of the company. The learned judge noted that in relation to the absence of evidence on the company's financial distress, the second and third respondents counsel had submitted that the true financial position of the company would be known after the first respondent herein had submitted his report on the company's financial position.

The learned judge noted the response by the applicant's counsel to allegations that the applicant deposed to material falsehoods. The response was that the issue was properly to be determined on the return date. The applicant also averred that the issue of falsity of depositions also arose in paragraph 9.5 of the first and second respondents' affidavit wherein they stated that the company had four directors currently and that if that was so, then two directors could not have validly passed the resolution as was purportedly done.

In his analysis the learned judge noted that the applicant was seeking a provisional order to suspend the operation of the circular resolution executed by the second and third respondents pending the determination of the matter on the return date. The applicant was also seeking on the return date, an order that he be declared the 100% shareholder in Adlecraft Investments (Pvt) Ltd.

The learned judge was directed to determine the application in terms of rule 60(9) of the High Court Rules. The learned judge quoted the rule *ex tenso* as I have already noted it herein. The learned judge noted in his judgment that the purpose of the provisional order or interlocutory injuction was as explained in the case of *Attorney General* v *Punch Limited and Anor* [2002] UKHL 50 where it stated:-

> "*The purpose for which the court grants an interlocutory injuction can be stated quite simply. In American Cynamid Co v Ethicon (Pvt) Ltd [1975 AC 396, 405 D LORD DIPLOCK described it as remedy which is both temporary and discretionary. Its purpose is to regulate, and where possible, to preserve the rights of the parties pending the final determination of the matter which is in issue*".

The learned judge also stated the requirements that an applicant who seeks interim relief in the nature of a provisional order must establish.

The learned judge made a finding that the crux of the application was whether or not the circular resolution which purportedly placed the company into voluntary liquidation was valid. The matter turned upon the interpretation of the provisions of section 196(1) of the Companies and Other Business Entities Act which reads as follows:-

> "*196 Directors acting other than in person at meeting -*
>
> *(1) A decision that could be voted on at a meeting of the board of company may instead be adopted by written consent stating the action so taken, signed by all of the directors entitled to vote on the matter. A decision made in such matters is of the same effect as if it had been approved by voting at a meeting.*
>
> (2) ..... *"*

The learned judge made the following factual and legal findings as may be seen upon a reading of the cyclostyled judgment;

(a) The applicant had established that he was a director of the company in issue and that the fact was not in dispute.

(b) The applicant had petitioned the court as a director of the company and not as a shareholder and that the argument by the second and third respondents that the applicant should have instituted a derivative action fell away since the applicant was challenging the validity of a director's resolution.

(c) The applicant by reason of being a director had an interest in the company and that the second and third respondents had sent him the disputed circular resolution to sign because they accepted his interest in the company.

(d) That if the resolution was not passed in terms of the provisions of section 196(1) of the Companies and Other Business Entities Act [*Chapter 24;31*], then it was irregular and invalid, hence, it could not be ratified since an invalid act cannot be validated by ratification.

(e) That the argument that the applicant had lied in his affidavit on the shareholding structure of the company was an issue which went to the root of the final relief sought in regard to the claim for a declaration of 100% shareholding made by the applicant. The learned judge could not make such a finding at this stage since the parties presented different versions on the shareholding. The issue would be determined on the return date.

(f) That first respondent's contention that the removal of the corporate rescue practitioner could only be made in terms of section 132 of the Insolvency Act missed the point which was that the challenge of the applicant was that the resolution placing the company under corporate rescue was invalid. If invalid, then it would follow that any act made based upon it would be invalid. The fourth respondent could only rely on the grounds for removal of the corporate rescue practitioner not having been pleaded and proved if his appointment was regular.

(g) That the applicant had established a *prima facie* case for the grant of the provisional order and that if the impugned circular resolution was not suspended until the return date, the applicant would suffer irreparable harm to the extent that the corporate rescue proceedings would continue premised upon an invalid resolution rendering the proceedings a nullity.

On the above findings, the learned judge granted the provisional order.

I have considered the grounds of appeal of the second and third respondents. I deal with them in turn.

Ground 1 – the second and third respondents averred that the applicant did not have locus standi to sue for the relief sought as he was not a shareholder and that the court therefore erred at

law to grant the applicant relief based upon the applicant being a director. There are no prospects of success of this ground of appeal. The learned judge properly exercised his discretion to grant the provisional order after the applicant established a *prima facie* case. The second and third respondents are the ones who prepared a circular resolution without the applicant's participation. A reading of section 196(1) of the Companies and Other Business Entities Act is clear in its provisions that short of holding a formal meeting of the board of a company, the directors may adopt a resolution by written consent of all directors who are entitled to vote on the matter. It was common cause that the resolution in issue was not signed by the applicant yet he was entitled to vote on the matter. The applicant as an affected director was entitled to challenge the resolution in such capacity. The applicant clearly had *locus standi* to challenge the validity of the resolution as he did. The proposed ground of appeal is meritless.

Ground 2 – that the court erred at law to interdict lawful conduct taken pursuant to statutory authority. There is no merit in this ground of appeal. The lawfulness of the conduct of the second and third respondents and whether the conduct was properly taken in terms of statute is the gravamen of the application. The second and third respondents sent the impugned circular resolution to the applicant for signature to evidence his written consent. The applicant refused to sign the resolution. Therefore there was no consensus of all directors and thus it was not validated by signatures of all directors as provided for in section 196(1) aforesaid. The applicant therefore established a *prima facie* case for the suspension of the circular resolution. The applicant adduced evidence not really disputed to establish that he was a director of the company who however did not participate in the resolution to place the company under corporate rescue and refused to sign the resolution on a matter on which he was entitled to vote. *Prima facie*, the evidence would render the circular resolution non-compliant with section 196(1) aforesaid. The ground of appeal has no prospects of success.

Ground 3 – that the court erred at law to grant an interdict on a non-existent cause of action because the Insolvency Act provides for specific instances when a court may intervene is vague and embarrassing. It is itself non-specific for being widely generalized. The judgment clearly identified the cause of action being the invalidity of a circular resolution issued in terms of the Companies and Other Business Entities Act. The circular aforesaid gave use to the invocation of the Insolvency Act. So, if the circular resolution is invalid then the invocation of the Insolvency

Act was invalid. The ground of appeal pre-supposes that the invocation of the Insolvency Act was a valid act and this is where the second and third respondents have missed the real issue which the court decided. There is no merit in this ground of appeal.

Grounds 4, 5 and 6 – that the court erred at law to grant relief to the applicant whose applicant was beset with material falsehoods relating to the company shareholding relates to an issue which the learned judge considered in his judgment. The two grounds speak to the same thing. The issue of falsity or authenticity of documents of shareholding was an issue left for determination on the return date. In any event on the return date, the applicant's prayer was *inter alia* for a declaration that he was the 100% shareholder of the company concerned. The learned judge noted that the applicant's prayer in the interim was for a suspension of the circular resolution. Even the second and third respondents did not contend that section 196(1) was complied with. They presented alternative arguments relating to the competency of the company being able to ratify the resolution. The argument was dismissed by the learned judge. The learned judge had a discretion to issue the provisional order and properly did so. These grounds of appeal have no prospects of success.

Ground 7 that the court erred to find that there was a *prima facie* violation of section 196 aforesaid when; "*it had been shown that there was compliance with this provision of the law by the appellants*". This ground of appeal is just so generalized as to be meaningless. Besides its generalized nature the evidence *prima facie* showed that there was no compliance with section 196 aforesaid because there was no director's consensus on the resolution. The applicant refused to sign the resolution. It was therefore a resolution of the second and third respondents and not of all directors entitled to vote on the matter. There is therefore no merit in this ground of appeal.

In relation to the appeal by the first respondent herein, it is difficult to appreciate the import of the appeal and I do not propose to deal with the individual grounds of appeal in any greater detail than to comment that they are premised upon a failure to appreciate the import of the application. The issue which the learned judge considered was the impugned circular resolution which catapulted the corporate rescue proceedings and the appointment of the first respondent as corporate rescue practitioner. The first respondent had no role to play there and at best he would have been advised to abide by the decision of the court on whether or not the circular resolution was properly and validly procured in terms of section 196 of the Act.

The grounds of appeal are based on the premise that since the corporate rescue status of the company had not been set aside, the applicant could only seek relief set out under sections 123 and 132 of the Insolvency Act. This is where the first respondent much as the second and third respondents are misdirected. The application was not founded upon the Insolvency Act. It was founded on section 196 of the Companies and Other Business Entities Act. Once it was determined that there was a prima facie violation of section 196 aforesaid, it meant that everything done pursuant to the violation would fall aside. It must be appreciated that the learned judge suspended the operation of the violation. One fails to appreciate what the problem caused by the suspension is for the 1st respondent. The first respondent is least qualified to be of assistance on whether or not the circular resolution was validly passed. He was not involved and has no personal knowledge of the processes which were at play.

The first respondent's notice of appeal raises issues of the applicant having approached the court with dirty hands. This was a preliminary point raised at the initial hearing of the application. It was determined against the first respondent in judgment HH 650/21. No appeal was filed in relation to the dismissal of that and other points *in limine*. The first applicant cannot sneak in this ground of appeal because his notice of appeal clearly shows *ex facie* that it is against judgment HH 668/21.

In relation to whether the court erred in granting relief other than that consequent on sections 123 and 132 of the Insolvency Act, I have already dealt with the issue when considering the grounds of appeal filed by the second and third respondents. The first respondents fails to appreciate that the application was founded upon an alleged violation of section 196 of the Companies and Other Business Entities Act.

The first respondent also averred that the court erred to grant a null and void interdict because it should have set aside the certificate of appointment of the first respondent first. The ground of appeal has no substance. The resolution in issue brought about the current corporate rescue status of the company. Corporate recue status is a step by step process starting with the resolution. If that first step is nullified or suspended, it is the foundation and without it anything built upon it falls away. There is no merit in the ground of appeal because the certificate is by law suspended if the foundation is suspended.

The first respondent in ground 4 averred that the court erred to find that "*1st respondent* (sic)" had established a *prima facie* case. Apart from the wrong citation of the party, the ground of appeal is so generalized as to be meaningless. It must be left at that. It has no prospect of success. It is not a ground of appeal which can be answered.

The ground of appeal number 5 is without substance because the court did not premise its order upon any assumption as alleged. The learned judge did not assume anything. The learned judge interrogated the facts surrounding the making of the circular resolution and applied the provisions of section 196 of Companies and Other Business Entities Act. The learned judge determined that *prima facie,* the circular resolution did not comply with section 196 aforesaid. Even the second and third respondents sought to argue that the resolution could be ratified and did not persist that it was section 196 compliant. The learned judge did not make a final order as alleged in the ground of appeal. This ground of appeal has no prospects of success.

Having determined that the grounds of both appeals have no prospects of success, this is not the end of the matter. I must consider the issue of the balance of convenience and prejudice to the parties. The issue at play concerns an alleged violation of a statutory provision, section 196(1) of the Companies and Other Business Entities Act. The learned judge on page 10 of the cyclostyled judgment noted that corporate rescue process was premised upon the assumption that the resolution founding the process was validly passed. The learned judge stated:

> *".... if on the return date the court decides that the circular resolution was taunted by irregularities, then it follows that the entire process founded on that defective resolution collapses ..... if the operation of the resolution placing the company under corporate rescue proceedings is not suspended, then he (applicant) may suffer irreparable harm to the extent that the corporate rescue proceedings may continue on the basis of a defective resolution ....."*

I must keep in mind that an act done contrary to the law is invalid and of no force or effect. *Mr Nyamakura* for the applicant in his heads of argument cited the case of *Schierhout* v *Minister of Justice* 1926 AD 99 at 109 where the following is stated:

> "*It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated ..... so that what is done contrary to the prohibition of the law is not only of no force of no effect, but must be regarded as never having been done – and that whether the law given has expressly so decreed , or not, the mere prohibition operates to nullifying the act*".

Thus in case, with the resolution having been found to be prima facie invalid, it would be improper for the court to exercise a discretion which has the effect of giving effect to the impugned resolution. The company was operational prior to the passing of the circular resolution and it can still continue to operate. The provisional order can also be anticipated by any affected respondents and it remains temporary. The issue of balance of convenience must be paramount and it is achieved by granting the order of execution pending appeal to avoid the perpetration of a *prima facie* established illegality.

The determination I make is therefore that:

1. Pending the determination of appeals SC 462/21 and SC 463/21, the judgment appealed against in case number HC 5436/21 (ref HH 668/21) shall be carried into execution pending the determination of the said appeals.
2. The costs of this application shall be in the cause in case number HC 5436/21 upon its determination on the return date.

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