

KING'S DAUGHTER MINING COMPANY UK LIMITED  
versus  
REDWING MINING COMPANY (PRIVATE) LIMITED (*Under corporate rescue*)  
and  
ASSOCIATED MINEWORKERS UNION OF ZIMBABWE  
and  
THE MASTER OF THE HIGH COURT  
and  
THE REGISTRAR OF COMPANIES  
and  
CECIL HONDO MADONDO

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
HARARE, 17 September 2021

Date of written judgment: 9 March 2022

### **Opposed application**

Mr *G Gapu*, for the applicant  
Mr *G R J Gumbo*, for the second respondent  
Adv *G Madzoka*, for the fifth respondent  
No appearance for the first, third and fourth respondents

MAFUSIRE J

[1] Kings' Daughter Mining Company UK Limited [**"KD"**] is a company registered in the United Kingdom. It is the applicant in these proceedings. It is the sole shareholder of the first respondent [**"Redwing"**]. Redwing is a mining company registered in Zimbabwe. It is under corporate rescue in terms of the Insolvency Act [*Chapter 6:07*]. It was placed under corporate rescue by an order of this court in HC 99-19. Such placement was at the instance of the first respondent's workforce, represented by their trade union, the second respondent herein [**"the Trade Union"**]. The fifth respondent [**"Madondo"**] was appointed the corporate rescue practitioner. The third respondent, the Master of the High Court [**"the Master"**], and the fourth respondent, the Registrar of Companies, are just nominal parties in these proceedings on account of their statutory duties and obligations in respect of distressed companies.

[2] The current proceedings are two applications, HC 7218-20 and HC 6478-20. They were consolidated and heard together. In HC 7218-20 KD seeks the setting aside of the order in HC 99-19 placing Redwing under corporate rescue. This is on the basis that Redwing is no longer depressed; that such of the debts as had been weighing it down have since been paid off, and that with the guaranteed financial support by KD, as the parent company, it is now able to operate normally as a going concern.

[3] In the alternative, KD seeks the setting aside of the order appointing Madondo as the corporate rescue practitioner for Redwing. This is on the grounds that he has messed up his mandate in a number of ways, not least his failure to incept a proper corporate rescue plan as required by s 142, as read with s 143, of the Insolvency Act. He is also accused of having invited and bred chaos at Redwing's mining site by parcelling out the same mine, albeit with different shafts, to several joint venture partners. It is said that Madondo has promised to convert the capital injection by those joint venture partners into equity, contrary to procedure. He is also accused of double dipping in that for his fees he bills both Redwing and the joint venture invitees. All in all, KD slates Madondo for general incompetence and therefore liable to be removed as corporate rescue practitioner in terms of s 123(1)(b) of the Act.

[4] HC 6478-20 is Madondo's own application for an extension of the publication of the corporate rescue plan from the forty-five [45] business days prescribed by s 142(5) of the Insolvency Act<sup>1</sup>. The extension is sought for nine months. This is on the basis that corporate rescue proceedings have been frustrated by Redwing's numerous but frivolous proceedings to stop them. The other reason given is that there have been frequent disruptions to court proceedings generally following the outbreak of the Covid-19 global pandemic whereby access to the courts had become restricted during the relevant period.

[5] The background to these proceedings, very briefly, is this. Redwing was apparently saddled with debts. For some time it was operating at below capacity. Among other things, its workers went unpaid for years. They took to the law and applied for its corporate rescue through the Trade Union. Redwing opposed the application. But in spite of such opposition,

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<sup>1</sup> Although in the actual application the extension is sought from the three months prescribed by s 125(3) of the Insolvency Act which is for the termination of the corporate rescue proceedings as a whole.

the application was granted, *per* MUZENDA J. Madondo was appointed the corporate rescue practitioner. That was on 23 July 2020.

[6] On 27 July 2020 Redwing appealed the order by MUZENDA J. An appeal suspends the operation of the judgment appealed against. To counter that, the Trade Union applied for leave to execute pending the appeal. Redwing opposed the application. But despite such opposition the leave was granted, again *per* MUZENDA J. That was on 3 September 2020. Thus, corporate rescue proceedings would continue. But soon thereafter, KD brought an urgent chamber application in which the interim relief sought was an interdict barring Madondo from performing any functions as corporate rescue practitioner until the return day. The final relief sought on the return day was a show cause order for the setting aside of Redwing's placement under corporate rescue, or, in the alternative, Madondo's removal as corporate rescue practitioner.

[7] Apart from Redwing, KD owns another mining company in Zimbabwe, operating in Mazowe [*"Mazowe"*]. It too had been placed under corporate rescue. Madondo had also been appointed the corporate rescue practitioner. Thus, in that urgent application, it was common cause that Redwing and Mazowe were "sister" companies. The basis for the interim interdict sought by Redwing against Madondo was that he was conducting himself so improperly, actually unlawfully, in regards to Mazowe that Redwing entertained a reasonable apprehension that he would also do the same with it. It was alleged that Madondo was conflicted. He desired to promote his own personal and financial interests at the expense of the company he was appointed to rescue. Not only was he charging exorbitant fees for his services, contrary to statute, but also such fees were unlawfully being billed in foreign currency. Redwing feared that if Madondo was allowed to carry on as its corporate rescue practitioner, it would suffer the same fate, hence the interdict. However, KD withdrew the urgent chamber application, but not before this court had granted a modified interim relief, *per* CHITAPI J. It was to the effect that any fees raised by Madondo for his services had to be referred to the Master for authorisation.

[8] Before me, the two applications are vigorously contested. In HC 7218-20, the Trade Union opposes the application on the basis that it lacks *bona fides*. It is argued that the same grounds for seeking the setting aside of the corporate rescue proceedings and or Madondo's

appointment as corporate rescue practitioners were the same grounds put forward previously for resisting or attacking the process, but without success. It is argued that nothing said by KD in the present application is any proof that Redwing is no longer in the red. There has been no demonstration of any such injection of funds by KD as to guarantee Redwing going back to normalcy to operate as a going concern. Not all creditors have been paid. The workers' arrear salaries have not been cleared. The mine is running largely thanks to the injection of capital by the joint venture partners. Madondo makes common cause with the Trade Union and denies any impropriety in his execution of the duties of corporate rescue practitioner.

[9] On its part, KD opposes Madondo's application for an extension of time, firstly on the technical ground that, instead of making a straight application to court, he has come before a judge via the chamber book. Secondly, it is argued that no valid reason has been advanced for seeking an extension for a whopping nine months when no cogent reason has been given why the corporate rescue plan was not incepted within the prescribed forty-five days. It is argued that the Act prescribes only three months for the completion of the entire corporate rescue proceedings. The extension is being sought well outside those three months, the application having been launched in November 2020, and Madondo himself having been appointed in July 2020. KD concludes its opposition by insisting that all the major debts for Redwing, including arrear salaries for the employees, have been paid, largely on account of its injection of funds as the sole shareholder.

[10] At the hearing, the parties agreed that the real deal was HC 7218-20. Its outcome would largely seal the fate of HC 6478-20, the extension application. But by the time of the hearing in September 2021, there had been significant developments on the ground. Among other things, Madondo had been suspended by the Master as Redwing's corporate rescue practitioner. The suspension was pending his removal from office. This suspension followed a complaint laid to the Master and the police by one of the joint venture partners. It accused Madondo of fraud. It said Madondo had duped it into becoming a joint venture partner in Redwing, persuading it to sign an agreement for the purpose after which it poured large sums of money into the project in return for mining rights but only to discover that Madondo had done the same thing with other companies. Madondo was charged with fraud. At the time of the hearing he was out of custody on remand pending trial.

[11] However, despite his suspension as aforesaid, despite the appointment of another person in his place as corporate rescue practitioner, and despite the charge of fraud against him, Madondo did not throw in the towel. The argument for and against his removal went the full distance. On its part, KD, despite these developments, did not abandon the main claim for the setting aside of the corporate rescue proceedings even though a new practitioner was now in office. The main argument also went the full distance.

[12] KD cannot succeed on its main claim. I accept the argument by the respondents that there has been no demonstrable proof that Redwing is out of its parlous financial state. There has been no cogent evidence that the situation that was prevailing at the time that it was placed under corporate rescue by this court has changed significantly. Admittedly, corporate rescue proceedings are manifestly of short duration in terms of the Insolvency Act. A period of three months is given by s 125(3). Beyond that, the leave of the court is required. In terms of s 125(2), corporate rescue proceedings end when, *inter alia*, the court sets aside the order of corporate rescue.

[13] The respondents have a point. Litigation has been unrelenting. Without in any way appearing to excuse Madondo's apparent failure or inability to meet the statutory programme of corporate rescue, it is evident that a lot of energy has been expended fighting legal battles in the aftermath of the order of corporate rescue in July 2020. The appeal did suspend the order of corporate rescue until leave to execute was granted. There were other proceedings that pitted essentially the same parties. So, apart from the fact that a new corporate rescue practitioner is now in office and whose response to KD's request to set aside the order of corporate rescue is necessary, I consider that KD's grounds are inadequate. For example, a great deal of the documents it has submitted as proof of payment of creditors allegedly from funds injected by itself, and of its capacity to prop up Redwing as a going concern outside corporate rescue, are severely contested. Workers remain apprehensive.

[14] However, given the appointment of a new corporate rescue practitioner, the application has in reality become stale. In essence, it has been superseded by events on the ground. At the hearing, there was information that the new corporate rescue practitioner had already inceptioned a new corporate rescue plan which had duly been accepted. It was being implemented.

Therefore, the corporate rescue proceedings, now under a fresh pair of hands, must be given a chance. In the circumstances, I would dismiss the main claim that seeks the setting aside of the order of corporate rescue.

[15] Regarding KD's alternative claim for the setting aside of the order in HC 99-19 appointing Madondo as the corporate rescue practitioner, the difficulty is that nothing has really been shown why the order itself should be set aside. Setting aside is rescission. The way the remedy is couched is to suggest that there was something wrong or irregular with the granting of the order right from the onset. But there was nothing wrong with that order, or at least nothing has been shown to have been done wrong. If there was, the appeal would deal with it. Rather, it is the events unfolding after that order, and the subsequent one for leave to execute, that found KD's application for Madondo's removal. For that reason, the proper relief would be his removal in terms of s 132 of the Act. The removal would be sought on the grounds of incompetence, or failure to perform duties properly, or conflict of interest (allegedly in placing personal financial interests ahead of the duty to rescue the company), and so on. That in fact, is what KD has pleaded and pitched its argument on. It is the couching of the draft order that is skewed.

[16] Be that as it may, and as pointed out already, a corporate rescue practitioner must prepare and publish a corporate rescue plan within 45 business days of his appointment. The corporate rescue plan is the blue print the corporate rescue practitioner follows as he or she embarks on the journey to take a distressed company out of its financial difficulties. In preparing that blue print, the corporate rescue practitioner must consult all the key stakeholders who include the creditors of the company and the major shareholders. KD is the sole shareholder in Redwing.

[17] Credible evidence placed before me shows that Madondo has been operating without an approved corporate rescue plan. KD's argument that he is breeding chaos at the mine is valid. Among other things, he has entered into joint venture and tribute agreements with outsiders. The agreements are of very long duration, like five to seven years, with rights of renewal on top of that. They have far reaching consequences. KD, a significant stakeholder, and therefore an interested party, is not being consulted, except when being asked for more

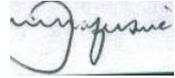
money. One of the joint venture partners has reported Madondo for fraud. The Master has suspended him from office. The police have arrested and charged him. He has been placed on remand. That is not to suggest he is guilty already. It is up to the criminal court to decide. It is merely to suggest that there is credence in the complaints by KD.

[18] However, in spite of the apparent skewed couching of the draft order by KD, and in spite of the right Madondo reposes to fight his suspension, I consider that the seismic shift on the ground is such that the alternative relief is unassailable. Effectively, it is now all water under the bridge. There is a new corporate rescue practitioner in office. Madondo is off the scene. He refuses to accept the fact. But *de facto* he is off the scene. This particular fact, coupled with the legal grounds advanced by KD in its cause, leads the court to declare that he be removed from office as a matter of law. That puts paid to Madondo's own application for an extension of time in HC 6478/20. It is liable to be dismissed.

[19] KD did not seek costs. But both the Trade Union and Madondo did, Madondo on the higher scale. KD has been unsuccessful in its main claim, but successful in the alternative relief. Its success in the alternative relief has automatically done away with Madondo's own claim in HC 6478/20. In it Madondo had also sought no costs. But KD had. As pointed out before, the Trade Union and Madondo supported each other. Given this scenario, I consider it appropriate to make no order as to costs. Therefore, the following orders are made:

- i/ The application by the applicant in HC 7218-20 for the setting aside of the order of this court in HC 99-19 placing the first respondent under corporate rescue is hereby dismissed.
- ii/ The fifth respondent in HC 7218-20 is hereby removed as the corporate rescue practitioner for the first respondent.
- iii/ The application by the fifth respondent in HC 7218-20, being the applicant in HC 64798-20, for an extension of time from three months to nine months to publish the corporate rescue plan for the first respondent, being the second respondent in HC 6478-20 is hereby dismissed.
- iv/ There shall be no order as to costs.

9 March 2022

A handwritten signature in black ink, appearing to read 'G. Gumbo', is written over a horizontal line.

*Scanlen & Holderness*, applicant's legal practitioners  
*Gumbo & Associates*, second respondent's legal practitioners  
*Coghlan, Welsh & Guest*, fifth respondent's legal practitioners