REPORTABLE (77)

REDWING MINING COMPANY (PRIVATE) LIMITED
v
(1) ASSOCIATED MINE WORKERS UNION OF ZIMBABWE (2) THE MASTER OF THE HIGH COURT
(3) THE REGISTRAR OF COMPANIES

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & CHITAKUNYE JA
HARARE: 31 JANUARY 2022 & 5 SEPTEMBER 2022

F. Girach, for the appellant

T. Magwaliba, for the first respondent

No appearance for the second and third respondents

CHITAKUNYE JA. This is an appeal against the whole judgment of the High Court sitting at Mutare in case number HC 99/19 handed down on 23 July 2020 as HMT 50/2020, placing the appellant under Supervision and Corporate Rescue proceedings in terms of s 124 of the Insolvency Act [*Chapter 6:07*].

FACTUAL BACKGROUND

The appellant is a duly incorporated company in terms of the laws of Zimbabwe. It is a subsidiary of Metallon Corporation Limited, a mining house incorporated in the United Kingdom. The mining house runs four mining companies in Zimbabwe namely Goldfields of Shamva (Private) Limited, Goldfields of Mazowe (Private) Limited, How Mine and the appellant. These four entities are run independently with separate finances, employees and assets.

The first respondent is a trade union duly registered in terms of the law and operating as a *universitas*. It represents workers in the mining and related industries who subscribe to its membership.

The second and third respondents were cited in their official capacities in compliance with s 124(2) (a) of the Insolvency Act, [*Chapter 6:07*] (the Act)

In the court *a quo* the first respondent sought the placement of the appellant under supervision and corporate rescue proceedings in terms of s 124(1) (a) of the Act. It alleged that it was an affected person as defined in s 2 of the Act in that it represents the rights and interests of workers in the mining and related industries. It is also an affected person in that it is a creditor as the appellant owes it union fees for its members. It therefore has *locus standi* to bring the aforesaid application.

The first respondent alleged, *inter alia*, that the appellant's workers, who are its members, are owed salaries for a period of 13 months, that the appellant has not been remitting Mining Industry Pension Fund (MIPF) Contributions for the past six years, and it has not been remitting funds to the National Social Security Authority (NSSA). The appellant deducts the money from its employees' salaries but does not remit the same to the relevant fund or authority. Further, that deductions meant for Nyaradzo and Moonlight funeral companies have equally not been paid to the funeral insurance companies despite having been deducted from the employees' salaries. The Appellant has been deducting trade union subscriptions from its employees' salaries but not forwarding the same to the first respondent. In the circumstances the first respondent is owed US$196 463-80 by Metallon Corporation Limited of which US$29, 000 is by the appellant. The first respondent further alleged that the appellant has not

been paying electricity bills to Zimbabwe Electricity Transmission and Distribution Company (ZETDC).

For the foregoing reasons the first respondent alleged that the appellant is a company in financial distress and should be placed under supervision and corporate rescue proceedings. The first respondent averred that it believed that there was a possibility of reviving the company under prudent corporate rescue management.

The appellant opposed the application.

In its opposition the appellant raised a number of points *in limine.* These included that: -

(i) The first respondent had no *locus standi* to bring the application as it was not an affected person as defined in the Act;

(ii) It was not aware that any of its employees were members of the first respondent and so challenged the first respondent to prove this aspect. In the absence of such proof the applicant had no *locus standi* to purport to represent its employees in the application;

(iii) That the purported members of 1st respondent were not its creditors in view of the settlement agreement whereby they agreed to get houses they were occupying *in lieu* of payment of arrear salaries; and

(vi) The first respondent did not comply with the peremptory provision of s 124(2(b) of the Act which requires that each affected person be notified of the application by a standard notice.

On the merits, the appellant denied that it was in financial distress and was unable to settle its debts as envisaged under the Act. It contended that the first respondent had failed

to provide useful details on the alleged salary arrears, MIPF and NSSA contributions. As far as it was concerned it was in the process of raising funds to resume operations at an optimum level. It also contended that regarding any alleged salary arrears the workers had entered into a compromise in December 2018 for them to be given houses they were occupying in *lieu* of the salary arrears. As far as it was concerned, that was a done deal awaiting implementation. The appellant further averred that it was in the process of raising funds and there were prospects that it would settle its debts within six months once it secured the capital injection it was seeking.

In response to the points *in limine,* the first respondent contended that it has the requisite *locus standi* by virtue of s 121 (1)(a)(ii) of the Act, it being a trade union which represents workers in the mining and related industries and also a creditor.

On the issue of notification of 'each affected person' by standard notice, the first respondent contended that it had done so by placing advertisements of the notice of the application in the Herald Newspaper and the Manica Post which newspapers, it alleged, had wide circulation. It also sent e-mails to known creditors.

The court *a quo* dismissed all the points *in limine* and granted the application for placement of the appellant under supervision and corporate rescue proceedings after considering the merits of the application.

In dismissing the points *in limine,* with reference to those that are relevant to this appeal, the court *a quo* held that the first respondent had *locus standi* as it was a trade union representing workers in the mining and related industries and was owed union dues. On the issue of notifying other affected persons by standard notice, the court *a quo* held that the

advertisements done in the newspapers were sufficient as they had resulted in Zimbabwe Electricity Distribution Company (ZETDC) and a Shareholder, Metallon Corporation Limited, responding. ZETDC consented to the order whilst the shareholder filed papers as intervenor in which it opposed the application.

On the merits the court *a quo* held that the first respondent had established a case for the granting of the order sought. It therefore granted the order.

Aggrieved by the court *a quo's* decision, the appellant noted this appeal on 7 grounds.

GROUNDS OF APPEAL

The seven grounds of appeal were couched as follows: -

1. The learned judge in the court *a quo* erred in not finding that the deponent to the founding papers did not have the necessary *locus standi.*
2. The learned judge in the court *a quo* erred in holding that advertisements in the press constituted compliance with the mandatory provisions of the Insolvency Act [*Chapter 6:07*) (the Act) in regard to service and in any event erred in not having regard to the definition of "standard notice" as set out in the Act.
3. The learned judge in the court *a quo* erred in failing to find that the claim brought by the workers had been compromised.
4. In any event, the learned judge in the court *a quo* erred in failing to place sufficient weight on the fact that the sum of $10 million dollars had been paid towards salaries which sum had been rejected by the workers.

5. The learned judge in the court *a quo* erred in finding that the onus was on the appellant to show that it should not be placed on corporate rescue proceedings.
6. The learned judge in the court *a quo* misdirected himself in finding that, on the facts, it was appropriate to place the appellant under corporate rescue in circumstances where the shareholder had presented a financial plan and further in circumstances where the proposed corporate rescue practitioner had not proposed a business plan to rescue the appellant.
7. The learned judge in the court *a quo* erred in finding that the appellant was financially distressed within the meaning of that expression as used in the Insolvency Act [*Chapter 6:07*].

BEFORE THIS COURT

Though seven grounds of appeal were raised I am of the view that the first two grounds of appeal, which are on the points *in limine* raised in the court *a quo,* are dispositive of the appeal.

The issue arising from the two grounds of appeal is: whether or not the court *a quo* erred and misdirected itself in finding that the first respondent had *locus standi* to bring the application in question and in finding that the notification by advertisements in newspapers met the requirements of the Act.

Mr *Girach*, for the appellant, submitted that the court *a quo* erred in finding that there was a valid application before it whereas the first respondent had not complied with the peremptory provisions of the Insolvency Act. He submitted that the application was fatally defective and ought to have been struck out. The provisions counsel argued were not complied with included s 124(2)(b) of the Act which requires the notification of each affected person by

standard notice and s 124 (1) which prescribes those eligible to apply for corporate rescue proceedings outside a company resolution.

Counsel submitted that the first respondent did not notify each affected person by standard notice as required by the Act. He submitted that the court *a quo* erred by holding that the advertisements in the Herald and Manica Post newspapers met the requirements of the Act in respect of what constitutes standard notice in the face of clear legislative provisions that such notice must be by registered mail, fax, e-mail or personal delivery. There is no provision for service by other modes such as advertisement.

On the issue of *locus standi*, counsel submitted that the first respondent's *locus standi* was not established as the appellant denied knowledge that any of its employees were members of the first respondent and that this issue was incapable of being resolved without *viva voce* evidence. The first respondent was thereby required to prove that it represented any of the appellant's employees and that it qualified as a trade union representing employees of the company as envisaged in s 121(1)(a)(ii) of the Act.

The Appellant's counsel also submitted that some of the employees alleged to be represented by the first respondent are in grades which cannot be represented by the first respondent. These therefore needed to also be notified but they were not.

Per contra, Mr *Magwaliba*, for the first respondent, submitted that besides notification by advertisement in the mentioned newspapers, the first respondent had also caused standard notices to be delivered to known creditors of the appellant by way of e-mails copies of which were attached to the answering affidavit. The first respondent, however, conceded that since the appellant is a big company it is possible that some creditors whose

e-mails had not been provided may not have been notified. It was in this light that standard notices were published in the Herald and the Manica Post newspapers. As a result of these publications more creditors availed themselves. Counsel therefore submitted that there was substantial compliance with the provisions of the Act. In the circumstances he submitted that the court *a quo* did not err in holding that publishing the standard notice in the two newspapers was in compliance with the Act.

On *locus standi* counsel submitted that the first respondent had *locus standi* as it represented workers in the mining and related industries, which included appellant's employees and it was owed union dues.

APPLICATION OF THE LAW TO THE FACTS

Corporate rescue is a recent phenomenon in this jurisdiction. The concept of corporate rescue was introduced in our jurisdiction by the enactment of the Insolvency Act [*Chapter 6:07*] in 2018. This Act repealed and replaced the old Insolvency Act [*Chapter 6:04*]. Part XXIII of the new Act introduced Corporate Rescue Proceedings replacing judicial management which was provided for in the old Companies Act, [*Chapter 24:03*].

The objective of corporate rescue proceedings is to restructure the affairs of a company in such a way that either maximises the likelihood of the company continuing in existence on a solvent basis or results in a better return for the creditors of the company than would ordinarily result from liquidation. This is done in a manner that balances the rights and interests of all relevant stakeholders. In this regard the proceedings aim to rehabilitate financially distressed companies under the temporary supervision of a qualified corporate rescue practitioner.

In this regard s 121(1)(b) of the Act provides that:

"(b)'corporate rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for —

i) the temporary supervision of the company, and of the management of its affairs, business and property; and

ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company …."

A company is financially distressed at any particular time when it appears that the company is reasonably unlikely to be able to pay its debts as they fall due and payable within the immediately ensuing six months or it is likely to become insolvent within those ensuing six months. The process is futuristic in nature. See s 121(1)(f) of the Act. It is thus intended for a company that is considered salvageable.

The placement of a company under supervision and corporate rescue proceedings may be commenced by a resolution of the company under s 122 or by an affected person in terms of s 124. Section 124 states that: -

"(1) Unless a company has adopted a resolution contemplated in s 122**, an affected person** may apply to a court at any time for an order placing the company under supervision and commencing corporate rescue proceedings.

(2) An applicant in terms of subsection (1**) must**—
(*a*) serve a copy of the application on the company, the Master and the Registrar of Companies; and
(*b*) **notify each affected person of the application by standard notice**.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section." (my emphasis)

It is clear that only an affected person may make an application in terms of s 124(1). An affected person is defined in s 121(1)(a) as follows:

"affected person', in relation to a company, means-

(i) a shareholder or creditor of the company; and
(ii) any registered trade union **representing employees of the company**;
(iii) if any of the employees of the company are not represented by a registered trade union, **each of those employees or their respective representatives**. (my emphasis)

It is imperative to note that upon making the application the affected person must, in terms of s 124(2)(b), notify other affected persons by standard notice. Standard notice is defined in s 2 as:

"standard notice' means notice by registered mail, fax, e-mail or personal delivery."

It is apparent from the above that each affected person can apply for corporate rescue and, where they are not the applicant, they must be served or notified of the application by standard notice.

The effect of placement of a company under corporate rescue proceedings is to impose a general moratorium on commencing or continuing with legal proceedings, including the enforcement of actions, against the company, or in relation to any property owned by the company, or in its lawful possession, in any forum, for the duration of the corporate rescue proceedings. This moratorium is automatic and comes into effect upon the filing of the application with the Registrar of the High Court as this is considered to be the commencement of corporate rescue. (See s 126(1)).

It is however important for any applicant to comply with the provisions of the Act as the consequences of the order sought are wide ranging and affect various stakeholders, including employees, who have direct interests in the welfare of the company.

The application must, without fail, be served on the company, the Master and the Registrar of companies. Each affected person must be notified of the application by standard notice and be allowed to participate in the court proceedings. The rationale is that every affected person must be accorded the opportunity to protect their rights and interests that may be affected by the placement of the company under supervision and corporate rescue proceedings.

If at the end of the hearing the court is satisfied that a company is in financial distress and it is just and equitable to do so, it may grant an order placing the company under supervision and commencing corporate rescue proceedings.

The definition of affected person has the effect of excluding those who do not meet such criteria such that a person or entity with a general interest, not stated above would not qualify to bring such an application. To have *locus standi* one must meet the criteria set – shareholder or creditor of the company; a registered trade union representing employees of the company, thus disqualifying any other trade union or representative body that may be in the industry but not representing employees of the company.

It therefore, follows that where a trade union does not represent all employees or certain grades of employees in the company such employees must be notified individually or through their respective representatives.

It is thus incumbent upon a representative applicant to show that they represent all employees of the company; if not all, that they have notified those they do not represent. It is incumbent upon an applicant to inquire or ascertain the list of affected persons if the provisions of this section are to be met. It may thus not be adequate to limit oneself to only those that one has knowledge of without a diligent inquiry.

The notification must be by standard notice as defined in s 2. The need for such stringent manner of service and notification arises from the fact that each affected person has the right to participate in the proceedings and unless they are served or notified with the notice as stipulated, they may not be able to exercise their right in that regard to protect their interests.

It is trite that where the legislature has in its wisdom specified or prescribed in peremptory terms a particular manner or procedure for effecting service or notification, the court has no power or jurisdiction to avoid that mandatory provision by expanding the provision to include that which the statute does not specify. See *Kaungwa v Nguni* 2008(2) ZLR 50 (H) at p 55.

It is also trite that in terms of the time-honoured and golden rule of statutory interpretation, words of a statute are accorded their primary and grammatical meaning. It is only when doing so would lead to a glaring absurdity or inconsistency with the rest of the statute that this should not be done. See *Nyamande &another v Zuva Petroleum (Pvt) Ltd & another* 2015(2) ZLR 186(S) at 190B, *Chegutu Municipality v Manyara* 1996(1) ZLR 262(S) at 264D-E and *Zambezi Gas Zimbabwe PVT Ltd v N R Barber & Another* SC 3/2020 at p 7.

In *casu*, there is no absurdity or inconsistency with the manner in which the legislature prescribed who may apply for corporate rescue and the peremptory procedural steps to be undertaken in the process.

In *Metallon Gold Zimbabwe (Private) Ltd and Others v Shatirwa Investments (Private) Ltd and others* SC 107/21 the first respondent in this appeal, and another creditor of sister companies to the present appellant, applied for the placement of the companies under supervision and corporate rescue proceedings in terms of s 124(1) of the Act. The first respondent in its application had alleged that it was an affected person, in that it was a registered trade union in the mining and related industries. It had also alleged, as in this case, that it also derived its *locus standi* from its creditor status of the sister companies. No judgment against the sister companies in its favour were attached to the founding affidavit to support the claim of *locus standi.* The standard notice in that case had also been effected largely by newspaper advertisements as in *casu*. After an extensive espousal of the law on corporate rescue this Court at p 22-3 aptly stated that:

> "It has already been established that s 124 of the Insolvency Act provides for the procedure to be followed when approaching the court for an order of corporate rescue.
> ……
> The statute is specific in relation to the appropriate applicant who is entitled to make an application for corporate rescue. The statute is specific so as to curb the abuse of the process by parties who may not have a substantial interest in the rehabilitation of a company as well as parties who may only be interested in their personal financial gain and not the rehabilitation of the company.
> In terms of the Insolvency Act, there is no ambiguity as to who an affected person is. It is either a shareholder, a creditor of the company, a registered trade union representing the employees of the company or the employees of the company who are not represented by a registered trade union. An applicant for corporate rescue is therefore confined to such persons."

The court disqualified the first respondent (second respondent then) as an affected person in that it did not meet the criteria specified in the Act. On the first respondent's

contention that it had *locus standi* as a registered trade union representing the rights and interests of employees in the mining and related industries, this Court aptly noted that the requirement was of a registered trade union representing the employees of the company and not just in mining and related industries. The first respondent therefore had no *locus standi*.

It is clear that s 121(1)(a)(ii) requires that the trade union must be one that represents employees of the company that is subject of the proceedings. It cannot be a trade union representing workers in the industry in general.

On the fate of the first respondent's failure to notify affected persons in terms of s 124 (2) of the Act, this Court, at p 24-6, held that:

> "The respondents failed to comply with the provisions of s 124 (2) of the Insolvency Act, which made their application a nullity as they failed to comply with peremptory provisions of the statute. …….
>
> ……..
>
> It is clear that standard notice can only be effected through registered mail, fax, e-mail or personal delivery. Nowhere in the Act is there a provision for standard notice to be by way of publication in a newspaper. Such notice was a nullity which vitiated the entire proceedings.
>
> Service by way of standard notice is a peremptory requirement as the Act uses the word "must". Deviation from peremptory requirements of the Act render an application fatally defective. It is imperative to conduct corporate rescue proceedings with the utmost diligence and care as they have far-reaching consequences, not only on the creditors, shareholders and employees of a corporation but the society at large. Corporate rescue is predicated on a broader social justice perspective unlike the old law of judicial management that was based on private corporate interest. Consequently, it is critical that the procedures laid down for corporate rescue be complied with to the letter. …….
>
> It is apparent that the failure to notify affected persons is not only a breach of peremptory provisions, but it also prejudices affected persons who have a substantial and legitimate interest in the fate of the company as they are not afforded an opportunity to respond to the application. Ultimately, the outcome of the application may prove to be adverse to them.

> The effect of non-compliance by an applicant for corporate rescue with the peremptory provisions of the Insolvency Act relating to notification of all affected persons by standard notice renders the application a nullity."

In *casu*, the first respondent conceded that it had not notified all affected persons by standard notice as envisaged in s 124(2)(b). It had only notified those it described as known creditors. To confirm that it had not notified all affected persons it in fact made reference in its founding affidavit to some creditors whom it had not notified, of whom two had fortuitously responded to the application. The shareholder was one such affected person not notified by standard notice despite a clear provision that shareholders must be notified. Further, despite alleging in its founding affidavit that the appellant owed ZETDC unpaid bills and so was a creditor, the first respondent did not notify ZETDC in terms of the Act. It instead sought to rely on the fact that ZETDC had responded to its advertisement as sufficient compliance with the Act.

Further, the appellant contended that some of its workers were not in the grades that the first respondent would represent and this was not disputed by the first respondent. It is equally not disputed that these other employees were not notified at all.

The applicant for corporate rescue has an obligation to notify all affected persons and the first respondent failed in this regard. See *Top Trailers (Pty) Ltd and Anor v Kotze* [2017] ZAGPPHC 1268. The consequence of failure to comply with the peremptory and clear provisions of the Act is that the application was a nullity.

On *locus standi*, Mr *Magwaliba* urged this Court to find that the court *a quo* did not err in its finding. It is clear from the judgment that the court *a quo* based its finding on

locus standi on the premise that the first respondent was a trade union representing workers in mining and related industries whereas the Act refers to a trade union representing employees of the company in question. From the fore going it is clear that the court *a quo* erred in this regard. The issue on this aspect was whether the first respondent represented employees of the appellant. Its alleged creditor status as a result of being owed union dues would only arise after establishing that it represented employees of the appellant company and not simply employees in mining and related industries. By relying on representation in the mining and related industries argument the court *a quo* failed to interrogate and determine the real issue. It was incumbent upon it to determine whether from the evidence placed before it, the first respondent had established that it represented employees of the appellant. The first respondent, as a Trade Union representing workers in mining and related industries, had no *locus standi* to bring such an application.

In conclusion, I find that the failure to comply with peremptory provisions on *locus standi* and on notification of all affected persons in terms of the Act was fatal to the application. The appeal has merit and ought to succeed.

COSTS

There were no submissions justifying a departure from the norm that costs follow the cause.

DISPOSITION

The appeal has merit as clearly the first respondent failed to comply with peremptory provisions of the Insolvency Act.

Accordingly, it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The order of the court *a quo* is hereby set aside and is substituted with the following:

   "The application for corporate rescue under HC 99/19 is hereby dismissed with costs."

BHUNU JA: I agree

CHIWESHE JA: I agree

Scanlen and Holderness, appellant's legal practitioners

Gumbo & Associates, first respondent's legal practitioners.