ELGATE INVESTMENTS (PVT) LIMITED	1ST APPLICANT
and	
ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION COMPANY	2ND APPLICANT
and	
NATIONAL SOCIAL SECURITY AUTHORITY	3RD APPLICANT
and	
ZIMBABWE REVENUE AUTHORITY	4TH APPLICANT
versus	
THE MASTER OF HIGH COURT	1st RESPONDENT
and	
WESLEY MILITALA	2ND RESPONDENT
and	
PARROGATE ZIMBABWE (PVT) LTD	3RD RESPONDENT
and	
DAVID WHITE HEAD RETRENCHES	4TH RESPONDENT
and	
COMMERCIAL BANK OF ZIMBABWE	5TH RESPONDENT
and	
CURRENT EMPLOYEES OF DAVID WHITE HEAD	6TH RESPONDENT

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 2 February 2011, 7 February 2011, 8 February 2011,
10 February 2011, 11 February 2011, 14 February 2011 & 23 February 2011

Advocate *Uriri*, for 1st applicant
Mr *Muchineripi*, for 2nd and 3rd applicants
N Mpumelo, for 4th applicant
G.N. Mlotshwa, for 2nd & 6th respondents
Mr *Ranchod*, for 3rd & 4th respondents
Mr *Rutanhera*, for 4th respondent

MTSHIYA J: This is an urgent application filed on 2 February 2011 and the applicants seek the following relief:

"Final Order

1. That the first respondent revokes the appointment of Wesley Militala as Provisional Judicial Manager of David Whitehead Textiles Limited for failure to give security for the proper performance of his duties in terms s 302(1)(b)(i) of the Companies Act [*Cap 24:03*] and appoints in his place a suitable person as the Provisional Judicial Manager of David Whitehead Textiles Limited.

2. That the first and second respondents pay the costs of suit at an attorney – client scale

INTERIM ORDER

1. That pending the finalization of this matter the first respondent forthwith suspends his appointment of Wesley Militala as Provisional Judicial Manager of David Whitehead Textiles Limited and that in his place he appoints an interim Provisional Judicial Manger with the same powers as granted to the Provisional Judicial Manager by the order of BHUNU J of (sic) the 1st December 2010.
2. That the first and second respondent (*sic*) pay the costs of suit at an attorney – client scale".

On 1 December 2010 this court granted a consent order (i.e. the provisional order yet to be discharged) in the following terms:-

"A. Respondents and an (*sic*) interested party shall show cause to this Court sitting at Harare on the 2nd day of March 2011 why an order should not be made in the following terms.

1. The first, second, third, fourth, fifth and sixth respondents are hereby placed under Judicial Management for an indefinite period.
2. Subject to the provisions of s 299 of the Company Act [*Cap 24:03*] the Master shall appoint WINSLEY MILITALA of Petwin Executor and Trust Co (Private) Limited as Judicial Manager of first, second, third, fourth, fifth and sixth respondent companies with the powers and duties set out in s 302 and 303 of that Act, and subject to the supervision of this court.
3. From the date of that appointment and upon completion of a bond of security in accordance with s 274 of the Company Act [*Cap 24:03*], the Judicial Manager shall forthwith take over the management of the first, second, third, fourth, fifth and sixth respondents companies and shall prepare and submit reports in accordance with s 303 (c) of the Act.
4. The Judicial Manager shall have the powers set out in sub-para(s) (a) to (m) of s 306 of the Act [*Cap 24:03*] and, without the consent of creditors or the shareholders, may raise money on the security of the first, second, third, fourth, fifth and sixth respondent companies assets, or with the consent of the Creditors and Shareholders dispose off (*sic*) part of the assets of the respondent companies to raise working capital or to enter into a scheme of arrangement to resuscitate the companies.
5. All actions and applications and the executions and of all writs, summonses and other process against the first, second, third, fourth, fifth and sixth respondent companies shall be stayed and not proceeded without the leave of this Court.
6. The Judicial Manager shall be entitled from the assets of the respondent companies, to the payment of remuneration at a rate to be determined by the Master of the High Court and to reimbursements for all out-of pocket expense (*sic*) incurred by him in the course of his duties.

7. The Judicial Manager shall pay both applicant's and respondents' costs of thee proceedings out of the assets of the Company.

B. Pending the grant of an order in terms of para (A) or the discharge this order.

1. The first, second, third, fourth, fifth and sixth respondents companies are hereby placed under provisional Judicial Management and subject to the supervision to (*sic*) this court, shall be under the management of a Provisional Judicial Manager Appointed in terms of s 299 of the Companies Act [*Cap 24:03*] subject to s 300 of this Act. (*sic*)
2. The Master of High Court is hereby directed to appoint WINSLEY MILITALA of Petwin Executor and Trust Co (Private) Limited who is a suitably qualified and experienced person, as Provisional Judicial Manager of the first, second, third, fourth, fifth and sixth respondents.
3. Sub-paragraph 2-7 of para (a) of the draft order shall apply *mutatis mutandis* in relation to first, second, third, fourth, fifth and sixth respondents have been finally placed under Judicial Management.
4. This order shall be published one (*sic*) in the Government Gazette and once in the Herald newspaper. Publication shall be the short form annexed to this order.
5. Any person intending to support or oppose the application on the return day of this order shall:-
   (a) Give due notice to the applicants at Gasa Nyamadzawo & Associates.
   (b) Serve on the applicant (and on the respondent) a copy of any affidavit which he files with the Registrar of the High Court".

The parties to the above consent order were:-

Zimbabwe Textile Workers Union	Applicant
and	
David Whitehead Textiles Limited	1st Respondent
DWT Holdings (Pvt) Ltd	2nd Respondent
DWT Spinning (Pvt) Ltd	3rd Respondent
DWT Cotton Wools (Pvt) Ltd	4th Respondent
& 4 Ors	

In line with clause B(2) of the interim order, the second respondent, Winsley Militala, (Mr Militala) was duly appointed Provisional Judicial Manager of:-

1. David Whitehead Textiles Limited
2. DWT Holdings (Pvt) Ltd
3. DWT Spinning (Pvt) Ltd
4. DWT Cotton Wools (Pvt0 Ltd and 2 Other companies (only referred to as fifth and sixth respondents in the consent order)

According to the founding affidavit filed with this application Mr Militala was

appointed as provisional judicial manager on 21 December 2010. Prior to his appointment the first respondent herein had requested him to provide security to cover an amount of Twelve Million United States Dollars (US$12 000 000). This request, according to the founding affidavit, was made in terms of s 302 of the Companies Act [*Cap 24:03*] ("the Act"). In order to satisfy that requirement, Mr Militala obtained a bond of security from Allied Insurance Company. However, after he was already appointed, it transpired that Messrs Allied Insurance Company did not have he capacity to cover the full risk (i.e. US$12 000 000). The said insurance company subsequently withdrew its bond of security. That left Mr Militala without any form of security at all.

In addition to the absence of security, it was averred in the founding affidavit that Mr Militala as Provisional Judicial Manager had proceeded to allow a disputed claim of US$3000 000. It was stated that the confirmation of that claim between Eastway Agritech Investments Limited exhibited gross negligence on the part of Mr Militala. The disputed claim was still a subject to determination by this court in case No. HC 705/10

Furthermore, the first applicant alleged that Mr Militala had proceeded to sign a lease agreement between David Whitehead Textiles Limited and Kithra for no compensation (rental) except for a management fee of US$15000 payable to Mr Militala himself. The first applicant had advised the first respondent of his concerns about Mr Militala but no action had been taken.

The first applicant also alleged that a break-in had occurred at the industrial property of David Whitehead Textiles Limited resulting in a loss of property.

Due to the foregoing it was therefore the first applicant's view that speedy action was required to remove Mr Militala from the position of Provisional Judicial Manager. It was argued that to allow him to continue without cover of a security bond would endanger the interests of David Whitehead Textiles Limited and all Stakeholders. In order to deal with that situation the first applicant deemed it necessary to file this urgent application.

The application first came before me on 3 February 2011. At the first hearing I urged the parties to seek a practical and amicable settlement. To allow for discussions, I postponed the matter to 7 February 2011.

On 7 February 2011 the parties reported that no progress had been made towards a settlement and Mr *Mlotshwa*, for the second respondent, then applied for a day's

postponement, indicating Mr Militala was travelling from South Africa and would be in the country on 8 February 2011. I allowed the postponement to 8 February 2011.

On 8 February 2011, Mr *Ranchod,* representing the third respondent also appeared before me and indicated that the third respondent had an interest in the matter. Mr *Mlotshwa* for the second respondent also indicated that there were many creditors interested in the matter. He said those creditors would like to be heard. Mr *Nhemwa* for the applicant had no objection to the matter being postponed so that interested creditors could be served with the application.

In order to allow for other interested parties to be served with the application, I postponed the matter to 10 February 2011 and directed the first applicant to serve the application on all creditors appearing on the Provisional Judicial Management Report, including Parrogate (Pvt) Ltd (i.e. third respondent).

On 10 February 2011 and upon having been served with this application, the following companies/entities applied to be joined to the proceedings either as applicants or respondents

(a) Zimbabwe Electricity Transmission and Distribution Company

(b) National Social Security Authority

(c) Zimbabwe Textiles Workers Union

(d) City of Harare

(e) Mespic Trading

(f) Zimbabwe Revenue Authority

(g) Parrogate Zimbabwe (Pvt) Ltd

(h) David Whitehead Retrenches

(i) Commercial Bank of Zimbabwe

(j) Current Employees of David Whitehead

I granted the joinder applications in respect of the above applicants in the capacities in which they are now cited in this judgment.

On 11 February 2011, upon realising that some of the people who had made applications for joinder had no right of audience before me, I quickly corrected/altered my decision with respect to the following:-

(a) Zimbabwe Textile Workers Union

(b) City of Harare; and

(c) Mespic Trading

The above three entities were therefore not joined to the proceedings.

At the commencement of the hearing, Mr *Mlotshwa* raised the following preliminary issues (points *in limine*):-

"1. The non appearance of the Master of the High Court as a cited respondent rendered his reports inadmissible since they were not in affidavit form.

2. The citing of the Provisional Judicial Manager in his 'Individual' capacity was irregular.

3. The representation of the first applicant by Messrs Nhemwa and Associates (who *in casu* are instructing Advocate *Uriri),* when they had previously represented David Whithead Textiles Limited, created a conflict of interest and thus disqualifying the said legal practitioners to represent the first applicants *in casu*.

4. The form of the certificate of urgency prepared by Mr *Nhemwa* of Nhemwa and Associates did not clearly spell-out the urgency in the matter.

5. The issue of urgency ((i.e. is the matter urgent); and

6. The issue of non-joinder.

In addition to the above preliminary issues, Mr *Ranchod* also raised the following preliminary issue (i.e this shall be the 7th point *in limine*).

7. The provisions of ss 302 and 305 precluded the application from being determined as applicants have not sought to anticipate the return day of the provisional order.

After hearing detailed arguments on the preliminary issues, I asked the parties to also address me on the merits and indicated that my determination on the points *in limine* would, however, dictate whether or not there was need for me to proceed to the merits.

Noting the manner in which I wanted to proceed, Mr *Mlotshwa* correctly pointed out that it would be prudent for me to commence by making a determination of those points *in limine* which dealt with the issue of whether on not the applicants are properly before the court. Indeed that is the correct approach to be taken because it would certainly be improper to proceed to address the other issues when the applicants are ruled to be out of court. That being the case the issues that quickly fall for determination are the representation of the applicants by Messrs Nhemwa (issue 3) and non joinder (issue 6). I shall therefore consider those issues in the following manner:-

1. Whether nor not the representation of the first applicant by Messrs Nhemwa and Associates when they had previously represented David Whitehead Textiles Limited Created a conflict of interest capable of disqualifying the said legal practitioners from representing the first applicant *in casu.*

In addition to submitting that the preparation of the certificate of urgency by Mr *Nhemwa* was undesirable, Mr *Mlotshwa* for the second respondent, went on to point out that Messrs Nhemwa and Associates were in fact close to the issues for determination. He said present and retrenched employees of David Whitehead Textiles Limited had raised concerns of conflict of interest. This was so, he argued, because Mr *Nhemwa* had previously represented both current and retrenched employees of David Whitehead Textiles Limited. That being the case, Mr *Mlotshwa*, submitted it would be improper for Mr *Nhemwa's* legal firm to represent Mr Militala who is now the provisional judicial manager of David Whitehead Textiles Limited, because that would compromise the rights of employees.

In response to Mr *Mlotshwa's* submissions Advocate *Uriri* pointed out that Mr *Nhemwa* had represented a legal entity called Zimbabwe Textile Workers Union. This was in respect of retrenchment packages. He said the said entity shared the same views as applicant and therefore there was no conflict of interest. He said unlike the situation in *Core Mining and Minerals Resources (Pvt) Ltd v The Zimbabwe Mining Development Corporation and 4 Ors*, HH 280/10, where it was ruled that the legal practitioner in question had participated in the pertinent affairs of his client at a level that precluded him from appearing for the same client as a legal practitioner, there was no sufficient evidence *in casu* to justify a finding of conflict of interest.

I now proceed to determine the point *in limine*.

In *Central African Building Construction Company (Pvt) Ltd v Construction Resources Africa (Pvt) Ltd* HH 112/10, GOWORA J made the following pertinent comments:-

> "It is important that a legal practitioner should at all times retain his independence in relation to his client and the litigation which is being conducted …
>
> …….. A legal practitioners' duty is to protect the interests of his client and to give legal advice. It is not the function of the legal practitioner to then step into the shoes of the client and to perform acts that are materially related to the dispute before the court in an endeavour to buttress the case of his client ….".

I agree with the above principles relating to the conduct of legal practitioners and also wish to point out that in addition to the above important principles it should always be

remembered that a legal practitioner executes his duties as an officer of court. It would therefore be unfortunate if the independent mind of the legal practitioner is lost because of the need to win the case of his/her client at any cost. Such a legal practitioner would, in my view, have ceased to behave as an officer of court and consequently would render no assistance to the court.

In casu, in the absence of detailed evidence showing active involvement by Mr *Nhemwa* in the affairs of his client, I am not persuaded to accept that his representation of the Zimbabwe Textile Workers Union calls upon him to distance himself from any participation in this case as the first applicant's legal practitioner. The case cited above, namely Core Mining and Minerals Resources (Pvt) Ltd, *supra*, clearly demonstrate the need for clear evidence of activities/actions on the part of a legal practitioner that would disqualify him/her from representing a litigant. The facts alluded to should indeed clearly point to conflict of interest. Admittedly the Union represented workers but that alone, in my view, is not enough to establish conflict of interest. More evidence was required to show that the legal practitioners independence faced the danger of compromise.

In view of what I have said above, I am unable to uphold this preliminary issue. Messrs Nhemwa and Company are not barred from representing the first applicant and therefore had the legal capacity to file this application.

2. Whether or not the failure to cite the other parties to the provisional order granted on 1 December 2010 is fatal (i.e Non-Joinder)

Supported by Mr *Ranchod,* Mr *Mlotshwa* submitted that this application was not properly before the court because it was not filed in terms of s 301(2) of the Act which provides as follows:-

> "(2) The court or a judge may at any time and in any manner, on the application of a creditor, a member, the provisional judicial manager, the Master or any person who would have been entitled to apply for the provisional judicial management order concerned, vary the terms of a provisional judicial management order, including the date of the return day, or discharge it.

Mr Mlotshwa submitted that since the Court was already seized with the matter with respect to the provisional order granted on 1 December 2010 with a return date of 2 March 2011, the effect of the current application was to duplicate proceedings. He said the current application could not be determined in the absence of the companies under provisional judicial management. Those companies, he said, have an interest in this matter. Furthermore, Mr

Mlotshwa went, leave of this court had not been obtained for the application to be filed as required in terms of para A(5) as read with para B(3) of the provisional order of 1 December 2010.

With the support of Mr *Muchineripiri* and Ms *Mpumelo,* Advocate *Uriri* disagreed with Mr *Mlotshwa's* submissions arguing that it was not necessary to involve or cite the companies under provisional judicial management. He said those companies were already under the management and control of the provisional judicial manager, namely Mr Militala who is cited as the second respondent. The only interested parties, he argued, would be the Master of the High Court and creditors. These, he said, had been cited. He said there was therefore no question of non-joinder. Without seeking to have the parties to the provisional order of 1 December 2010, joined to the application, Advocate *Uriri* went on to submit that this court could still proceed in terms of r 87 of the High Court Rules, 1971 which provides as follows:-

> "(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
>
> (2) ……
>
> (a) …….
>
> (b) Order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as party;
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.
>
> (3) ……."

However, in order to fall within the ambit of s 301(2) and also to avoid duplicity of orders, Advocate *Uriri* moved for an amendment of the provisional order prayed for in this application. The proposed amendment would result in the substitution of a provisional order with a final order.

The proposed amendment was given as follows:-

> "That it be and is hereby ordered that the order of provisional judicial management issued out of this court on 1 December 2010 be and is hereby altered in para B(2) as follows:-

1. The appointment of Winsley Militala of Petwin Executor and Trust Co. (Private) Limited as Provisional Judicial Manager of the first to sixth respondents be and is hereby set aside.

2. The Master of the High Court shall forthwith appoint a suitably qualified person as Provisional Judicial Manager of the first to sixth respondents.

3. The second respondent shall personally bear the costs of this application".

I view the proposed amendment as a clear admission that the provisions of s 301(2) of the Act were never at the fore when this application was filed.

Mr *Mlotshwa* opposed the application arguing that critical parties had been excluded in this application. He said the companies under provisional judicial management still existed and were entitled to be heard.

Mr *Ranchoed* also opposed the application stating that the provisional order of 1 December 2010 was obtained through the consent of all the parties to it. There was therefore need for all parties to the existing provisional order to be heard.

In determining this point *in limine*, I shall start by stating that I agree with Mr *Mlotshwa* that the companies under judicial management still exist and retain their identies. They have only been placed under a provisional judicial manager in terms of s 303 which provides follows: –

"A Provisional Judicial Manager shall –

(a) assume the management of the company concerned and recover and take possession of all the assets of the company

(b) …….

(c) ……."

I believe that a company placed under judicial management does not automatically shed off its ownership or shareholding. It is the management that changes for the sole reason that, if properly managed, the company might move out of the problems that led to judicial management. That brings us to the purposes of judicial management.

In *Feigenbaum & Anor v Germanis Ors* 1998(1) ZLR 286 (HC), where all parties were cited, MALABA J, as he then was, in considering the distinction between liquidation and judicial management, quoted, with approval, from *S. Cohen Ltd v Johnson & Johnson* 1970 SA 332 (SLSA) where MULLER J said:-

> "The purposes of a liquidation order are entirely different form those sought to be achieved by an order for judicial management. In the one case, the very object is to wind up the affairs of a company and effect its dissolution; in the other the object is just the opposite, namely, to avoid liquidation where there is a chance of the company surmounting its difficulties by proper management, namely, management by a person appointed as judicial manager to conduct the affairs of the company subject to the supervision of the court.
>
> There is accordingly a fundamental difference between the function and powers of a liquidator and those of a judicial manager and also material differences between the rights of creditors of a company in liquidation and those of a company under judicial management". (my own underlining for emphasis)

In agreeing with the above, I also take the view that the owners/shareholders of a company under judicial management should never be ignored in court proceedings such as these. The proceedings have a direct bearing on the operations of the companies under judicial management. The owners/shareholders have, through a court process, only divested management to the provisional judicial manager. They remain the owners/shareholders of the company under provisional judicial management and that alone sends a loud call for their involvement in any matter related to the operations of their judicially managed companies.

In view of the above, I find merit in the submission that all the parties to the provisional order that the applicants want to amend/vary as permitted under s 301(2) of the Act, ought to have been cited. Failure to cite the companies under provisional judicial management, in my view, is a fatal irregularity which cannot be rectified by merely amending the provisional order prayed for in this application. Indeed the amendment proposed would have avoided a situation of having two provisional orders with different return dates on the same subject.

It in also correct that in terms of r 87 of the High Court rules, quoted elsewhere in this judgment, I can proceed to determine the real issues between the parties. I, however, believe that *in casu* such a move would be a betrayal of the need to follow laid down procedures. Our courts have always insisted that laid down procedure should be adhered to.

In *casu*, not only has the applicant failed to make a proper application as is its right under s 301(2) of the Act and also failed to cite the relevant parties, the applicant has further proceeded to ignore the directions given in the provisional order that it seeks to vary. Paragraph A(5) of the provisional order as read together with para B(3) of the said order reads as follows:

"All actions and applications and the executions and of all writs, summons and other process against the first, second, third, fourth, fifth and sixth respondent companies shall be stayed and not proceeded without the leave of this Court".

The above direction was given in terms of s 301(1) of the Act which states:-

"A provisional judicial management order shall contain:-

(a) …….

(b) …….

(c) such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the court may consider necessary;

and may contain directions that while the company is under judicial management, all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court. (own underlining)

"(2) …..

The above direction is contained in the provisional order that the applicants seek to vary.

A variation of the provisional order of 1 December 2010 in the manner proposed would certainly, in different ways, affect any of the parties to it, namely the companies under provisional judicial management. There was therefore need to seek leave of court to proceed with an application that would certainly have an impact on the management of the companies under judicial management.

There would also still be a need to re-advertise the varied provisional order reflecting the varied terms. The original parties ought therefore to be cited. It is those same parties who remain entitled to be heard on the return date.

It is further important to understand that judicial management means that the court, through the Master of the High Court, is managing the affairs of the entities placed under judicial management – whether provisional or final. The provisional judicial manager only operates under the direction(s) of the Master of the High Court. Given this scenario, it is therefore important and reasonable that any part wishing to vary the original directions of the court to the extent suggested *in casu*, must seek leave to do so. Accordingly, in the absence of such leave being granted, any attempt to proceed in terms of r 87 of the High Court Rules 1971

would be improper. I am therefore not persuaded to proceed in terms of r 87 of the Rules of the High Court. I believe such a move would amount to me assisting the applicants' to properly reconstruct their case and yet there is no leave of court for them to proceed with the application. This also means that the proposed amendment would be of no consequence since it would not cure that irregularity.

All in all, my finding, based on the issue of non-joinder as considered together with the provisions of s 301(2), is that the applicants are not properly before the court. That point *in limine* is therefore upheld. Having upheld that point *in limine* it means I am disabled from considering all the other preliminary issues raised, including the merits of the case. I cannot proceed to do that in the absence of a proper application before me.

I therefore order as follows:-

The application be and is hereby dismissed with costs.

C. Nhemwa & Associates, 1st applicant's legal practitioners
Muchineripi & Associates, 2nd & 3rd applicants' legal practitioners
Zimbabwe Revenue Authority (Legal Division)
Mlotshwa & Company, 2nd & 6th respondents' legal practitioners
Hussein Rachod & Co. 3rd & 4th respondents' legal practitioners
Scanlen & Holderness, 5th respondent's legal practitioners