CRISPEN MWETE N.O.
[In his capacity as Corporate Rescue Practitioner of Cold Storage Company (Pvt) Ltd.

Versus

BOUSTEAD BEEF (PVT) LTD

And

MINISTER OF LANDS, AGRICULTURE, FISHERIES, WATER & RURAL DEVELOPMENT

And

THE MASTER OF THE HIGH COURT N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 28 June 2023 & 6 July 2023

Urgent chamber application

T. Tavengwa, for the applicant
V. Mhungu, for the 1st respondent
L.T. Muradzikwa, for the 2nd respondent

DUBE-BANDA J:

[1] This is an urgent chamber application filed in terms of s 129(2)(b) of the Insolvency Act [Chapter 6:07]. The applicant seeks an order couched in the following terms:

> Final relief sought
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
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> i. The interim order granted be and is hereby confirmed.
> ii. The Livestock Farming Concession Agreement executed by the 1st and 2nd respondents on 19 February 2019 be and is hereby cancelled forthwith in terms of section 129(2)(b) of the Insolvency Act, 2018.
> iii. 1st respondent be and is hereby ordered to vacate from all Cold Storage Company (Pvt) Ltd premises immediately upon granting of this order failing

which the Sheriff of High Court be and is hereby ordered to evict the 1st respondent.

iv. Respondents to pay costs of suit.

Terms of the interim relief sought

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

a) Pursuant to the provisions of section 129(2)(b) of the Insolvency Act, 2018 the Livestock Farming Concession Agreement executed by the 1st and 2nd respondents on 19 February 2019 be and is hereby wholly suspended for a period of (90) ninety clear days, calculated from the date of granting of this order, to enable the applicant to investigate and compile an audit report of the financial status of Gold Storage Company (Pvt) Ltd.
b) For the avoidance of doubt, the 1st respondent's powers to manage and control the affairs and assets of CSC in terms of the Livestock Farming Concession Agreement executed by the 1st and 2nd respondents on 19 February 2019 be and are hereby divested and applicant be and is hereby authorised to enter any Cold Storage Company Facility and thereat take management and control of Cold Storage Company (Pvt) Ltd affairs and /or assets.
c) Respondents be and are hereby ordered to hand over all books accounts (*sic*), including all audited and unaudited financial statement for Cold Storage Company (Pvt) Ltd for the period between 19 February 2019 to date of granting of this Order to the applicant forthwith.
d) The Sheriff of the High Court be and is hereby directed to enforce order above (sic), should applicant meet any resistance from the 1st and 2nd respondents by entering the premises of Cold Storage Company (Pvt) Ltd and handing over such premises to the applicant.
e) The applicant be and is hereby directed to investigate and determine if the 1st respondent performed its obligations in terms of the Livestock Farming Concession Agreement referred to above within (90) days from the date of granting of this order.

f) The applicant be and is hereby ordered to surrender his findings within the period mentioned above to this Honourable Court and all the respondents.

Service of provisional order
Service of this order shall be done by the Sheriff of High Court.

[2] The application is opposed by the first and second respondents. The third respondent did not participate in these proceedings, and I take the view that it has elected to abide by the decision of this court.

Background facts

[3] This application will be better understood against the background that follows. Sometime in 2017 Cold Storage Company (Pvt) Ltd (CSC) made an application seeking to convene scheme meetings in terms of s 191 of the now repealed Companies Act [Chapter 24:03]. It was so distressed such that it was necessary for it to get into a scheme of arrangement with its creditors.

[4] On 22 January 2019 the Minister of Lands, Agriculture, Water, Climate & Rural Settlement (Minister) entered into Livestock Joint Farming Concession Agreement (LJFCA) with the first respondent - Boustead Beef (Private) Limited. The LJFCA was entered in terms of Part 11 paragraph 9 of the Schedule to the Joint Ventures Act [Chapter 22:22], which says:

> Rehabilitate, Operate and Transfer (ROT)
> 9. A contractual arrangement whereby any existing facility is handed over to a counterparty to refurbish, operate and collect user levies in the operation period to recover the investment and maintain for a franchise period, at the expiry of which the facility is turned over to the Government or a contracting authority. The term is also used to describe the purchase of an existing facility from abroad, and importing, refurbishing, erecting and consuming it within the host country.

[5] The existing facility referred to in LJFCA is CSC. CSC is a parastatal wholly owned by the Government of Zimbabwe. The object of LJFCA is in Article 1 of the agreement, it says:

> The parties hereby enter into a Livestock Joint Farming Concession (LJFCA) under Rehabilitate, Operate and Transfer model as provided for in Part 11 of the Schedule to the Joint Ventures Act [Chapter 22:22], for the purposes of Livestock Farming, Abattoir Operating, Meat Value Addition and Marketing locally and internationally. Specifically, the Livestock Joint Farming Concession Project (LJFCP) shall breed and pen fatten beef cattle, goats, game, ostrich and shall process / value add and market all the end products as outlined in Annexure "(VI)", the Business Plan. Slaughtering shall be on an increasing scale over the duration of this agreement.
> Any Joint Venture Agreement shall allow Boustead Beef to buy any outstanding current Legacy Creditors Liabilities / Debt, thus affording the formed Joint Venture Company further relief and Balance Sheet Restructuring.

[6] On 3 December 2020 CSC was placed under corporate rescue proceedings in terms of s 124 of the Insolvency Act [Chapter 6: 07]. Mr Kudenga of IDO Zimbabwe Chartered Accountants was appointed the interim corporate rescue practitioner. His appointment was not rectified by the creditors and Mr Majoko of Majoko & Majoko Legal practitioners was thereafter appointed substantive corporate rescue practitioner. Mr Majoko was later removed paving the way for the appointment of Mr. Mwete - the applicant. On 24 April 2023 this court ordered that the Master of the High Court issue out letters of appointment to the applicant as corporate rescue practitioner for CSC. On 10 May 2023 the applicant was issued with a certificate of appointment. According to the certificate he has powers to manage CSC in accordance with the provisions of s 133 of the Insolvency Act [Chapter 6:07]. A dispute centering on CSC has arisen between the applicant and the first respondent. The applicant contends that the first respondent has refused him access to CSC Bulawayo Abattoir for the purposes of carrying out his duties in terms of s 133 of the Insolvency Act. On the other hand, the first respondent contends that the applicant was unlawfully appointed to the office of the corporate rescue practitioner. It is against this background that the applicant launched this application seeking the relief mentioned above.

Points *in limine*

[7] The first respondent raised four points *in limine*. And the second respondent associated himself with the *in limine* points taken by the first respondent. At the commencement of the hearing, I informed Counsel for the parties that I shall adopt a holistic approach to avoid a piece-meal treatment of the matter. Wherein the points *in limine* are argued together with the

merits, but when the court retires to consider the matter, it may dispose of the matter solely on the points *in limine* despite that they were argued together with the merits.

[8] I now turn to the points *in limine*, *viz* the attack on the citation of the first and second respondents, the attack on urgency of the matter; the attack on the competency of the relief sought; and the contention that there are material disputes of facts which cannot be resolved on the papers.

Mis-citation of the 1st and 2nd respondents

[9] The first respondent contends that the applicant has not cited the correct parties. It complains that in the heading of the cover the applicant cites Boustead Beef (Pvt) Ltd, and in the founding affidavit in particular paragraph 3 he cites Boustead Beef Zimbabwe (Pvt) Ltd. And instead of citing the Minister of Lands, Agriculture, Fisheries, Water, Climate, and Rural Development he cited Minister of Lands, Agriculture, Fisheries, Water & Rural Development. It was contended that the mis-citation of the first and second respondent is fatal to this application.

[10] The first respondent is Boustead Beef (Pvt) Ltd, and this is the name that appears in the headings of the cover. And in paragraph 3 of the founding affidavit first respondent is now cited as Boustead Beef Zimbabwe (Pvt) Ltd. There is no doubt that Boustead Beef (Pvt) Ltd and Boustead Beef Zimbabwe (Pvt) Ltd are at law two different entities. The jurisprudence is that the citation that matters is the one in the founding affidavit. In *Ahmed v Docking Station Safaris Private t/a CC Sales* SC 70/18 the court said:

> It is trite that an application stands or falls on its founding affidavit. (See *Fuyana v Moyo* SC 54/06, *Muchini v Adams & Ors* SC 47/13 and *Austerlands (Pvt) Ltd v Trade Investments Bank Ltd & Ors* SC 80/06. In cases where the headings on the cover of an application tell one thing and the contents of the founding affidavit tell another, the nature of the application that is before court is determined by the contents of the founding affidavit and not the headings on the cover of the application.

[11] In *casu* the name of the first respondent is determined by the contents of the founding affidavit and not the headings on the cover of the application. Therefore, the suit is against

Boustead Beef Zimbabwe (Pvt) Ltd and the first respondent does not answer to this name. No amendment was sought. Even if it was the jurisprudence is that the citation of a non-existent party cannot be amended. See: *Veritas v ZEC & 2 Ors; Firinne Trust also known as Veritas v ZEC & 2 Ors* (SC 103-20, Civil Appeal No. SC 563/18) [2020] ZWSC 103 (17 July 2020). However, the applicant sought an amendment to correct the spelling of "Boustead" by removing the "a" between "e" and "d" and this was not opposed and I allow it. However, it does not rectify the material mis-citation resulting in an existing company being incorrectly cited or a wrong party being brought to court. The citation of Boustead Beef Zimbabwe (Pvt) Ltd is a mis-citation and is fatal to the citation of the first respondent. See: *Marange Resources (Private) Limited v Core Mining & Minerals (Private) Limited (In Liquidation) & Ors* SC 37/16. Therefore, there is no first respondent before court.

[12] Regarding the second respondent, the complaint is that the applicant cited the Minister of Lands, Agriculture, Fisheries, Water & Rural Development, when in fact it is Minister of Lands, Agriculture, Fisheries, Water, Climate & Rural Development. On the authority of *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC) I called for the cross-reference files involving these litigants and noted that in HC (CAPP) 245/23 the second respondent refers to himself as Minister of Lands, Agriculture, Fisheries, Water & Rural Development, the word "Climate" is omitted. In HC 1779/20 the second respondent is cited as Minister of Lands, Agriculture, Water and Rural Resettlement. The words "climate" is again omitted, and "development" is substituted with "resettlement." In the LJFCA it is referred to as the Ministry of Lands, Agriculture, Water, Climate & Rural Resettlement. Again, the word "development" is substituted with "settlement." With all these variations, omissions and substitutions I take the view that the mis-citation of the second respondent is not fatal. On the facts of this case, to say the mis-citation is fatal would be to elevate form over substance. I take the view that such will not be in the interest of the administration of justice.

[13] In view of the fact that I have declined to find that the mis-citation of the second respondent is fatal, the net effect of this finding is that one of the parties to the LJFCA is properly before court. And it is for this reason that I do not agree that this application is fatally defective on the basis of mis-citations. In the result the point *in limine* that this application is fatally defective has no merit and is refused.

Urgency

[14] The first and second respondents have placed the urgency of this matter in dispute. It is contended that the applicant did not act when the duty to act arose on 1 June 2023, the date the applicant says he was prevented from entering CSC Bulawayo Depot. This application was filed 14 June 2023. It is contented further that no prejudice will befall the applicant if this matter is not accorded a hearing on the roll of urgent matters, in that save for the Bulawayo Depot which is said to be under renovation, he has access to every other depot of CSC. It is said CSC has over 147 properties including 5 abattoirs, canning factory, tannery, 3 distribution centres and in excess of 300 000 hectares of ranch land, and 3 feed lots. It is further contended that the financial records that the applicant seeks were destroyed by the former employees of CSC. It is submitted that this matter is not urgent and must be removed from the roll of urgent matters.

[15] On the other hand, the applicant contends that this matter is urgent and qualifies to be accorded a hearing on the roll of urgent matters. He contends further that on 1 June 2023 he was barred from entering the CSC Bulawayo premises. On 7 June he was informed that he had no right to access any of the CSC premises without permission of the first respondent. The applicant contends further that he cannot discharge his duties as a corporate rescue practitioner without accessing the CSC. He intends to have a first creditors meeting on 23 June 2023, and without taking control of CSC he will have nothing to report to the creditors. It is on this basis that the applicant submits that this matter is urgent.

[16] In *Mushore v Mbanga & 2 Ors* HH 381/16 the court held that there are two paramount considerations in considering the issue of urgency, that of time and consequences. These are considered objectively. The court stated:

> "By 'time' was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action… By 'consequences' was meant the effect of a failure to act promptly when harm is apprehended. It was also meant the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis."

[17] On the accepted facts of this case the cause of action arose on 1 June 2023 and this application was launched on 14 June, a time-line of 14 days. A delay of 14 days cannot be said to be inordinate as to constitute self-created urgency. See: *Telecel Zimbabwe (Pvt) Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ)* HH 446/15; *The National Prosecuting Authority* v *Busangabanye & Anor* HH 427/15 at p 3: This application passes the time-line test.

[18] Regarding the consequences test I take into account that the applicant seeks the suspension of an agreement in terms of s 129(2)(b) of the Insolvency Act. The empowering provision authorises the corporate rescue practitioner to urgently apply to court to conditionally cancel an agreement. Whether the applicant succeeds or not is a different inquiry, the point is that he is authorised by the Act to approach this court by means of an urgent application. In the premises this application is urgent and deserves a hearing on the roll of urgent matters.

[19] In the result the point *in limine* attacking the urgency of this matter has no merit and is refused.

Incompetent relief sought

[20] The first respondent contends that the applicant cannot on the basis of the principle of privity of contract seek to suspend the LJFCA. The argument is that CSC is not a party to the LJFCA, the company he was appointed to administer. The LJFCA is between the Government of Zimbabwe and the first respondent. This challenge speaks to the merits of the matter. In *Ahmed v Docking Station Safaris Private t/a CC sales* SC 70/18 the court said the need to be meticulous is most important when drafting the relief sought. If the relief sought is imprecise and defective, the court cannot grant it. In *casu* the relief sought is not imprecise and defective, it is clear what relief the applicant is seeking. The essence of the challenge is that on the merits the applicant is not entitled to the relief sought. Put differently, that he has not made a case for the relief he is seeking. This challenge invites the court to engage with the merits of the matter.

[21] It is trite that a point *in limine* is divorced from the substance of a case and must be determined before the merits are considered. It is a point of law dispositive of the matter

without dealing with the merits. However, in this case for a determination whether the provisional relief sought is incompetent the court has to interrogate the merits of the matter. Once the merits are interrogated, it ceases to be a point *in limine*. Therefore, this point *in limine* is misplaced and it stand to be refused.

Material dispute of facts

[22] The first respondent contends that there are material disputes of fact which cannot be resolved on the papers. In *Muzanenhamo v Officer in Charge Law and Order & Ors* CC 3/13 the court said as a general rule in motion proceedings, the courts are enjoined to take a robust and common-sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party. In *Muzanenhamo v Officer in Charge Law and Order & Ors* (*supra*) the court said:

> The first enquiry is to ascertain whether or not there is a real dispute of fact. As was observed by Makarau JP (as she then was) in Supa Plant Investments (Pvt) Ltd v Chidavaenzi 2009 (2) ZLR 132 (H) at 136F-G:
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> > "A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

[23] The courts have repeatedly said that a mere allegation of a possible dispute of fact is not conclusive of its existence. The opposing papers must show a *bona fide* dispute of fact incapable of resolution without *viva voce* evidence having been heard.

[24] The first respondent contends that the following issues arise and they are critical to the resolution of this matter: whether the applicant was legally appointed to be the corporate rescue practitioner in terms of the Insolvency Act. It was submitted that he does not qualify for such appointment because he is conflicted, in that he was behind the CSC Scheme of Arrangement, he was the judiciary manager of a subsidiary of CSC called Wet Blue; and he is an associate /

advisor to Mr Majoko the removed corporate rescue practitioner of CSC. It was submitted further that in HC (CAPP) 245/23 the Minister is seeking rescission of HC (CHA) 11/23, and therefore his appointment is under challenge. And that central to the question in *casu* whether the LJFCA may be cancelled or suspended is the question whether the first respondent had performed its obligations in terms of the agreement. It is contended that it has, as demonstrated by the Minister in HC 245/23.

[25] I take the view that there is no real factual dispute in this matter. It is not in dispute that at this moment the applicant is a corporate rescue practitioner of CSC. And at this moment the fact that there is an attack on his appointment is inconsequential. The question whether he was legally appointed or not is not of concern to this court at this stage. His appointment is extant and has not been set aside by a court of competent jurisdiction. See: *Manning v Manning* 1986(2) ZLR 1 (SC); *Mauritius and Another v Versapak Holdings (Private) Limited and Another* SC 2 / 2022; *Fletcher v The Minister of Lands, Agriculture Fisheries, Water and Rural Development* HB 102/23; *Heuer v Two Flags Trading (Private)* HB 109/23. Again, whether the 1st respondent has performed its obligations in terms of the LJFCA is not a question to be answered by this court in this matter.

[26] In the circumstances the point *in limine* turning on the existence on material dispute of facts has no substance and is refused.

[27] I agree with what was said *per* MATHONSI J (as he then was) in *Telecel Zimbabwe (Pvt) Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ)* HH 446/15 that we are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute. I hope time will come when the courts will be allowed to spend more time engaging with issues of substantive justice as opposed to issues of spelling, omission of words in the citation of parties etc. Undeserving points *in limine* are a waste of the court's valuable resource, i.e., time.

[28] I now turn to the merits of this matter.

Merits

[29] At this stage of the proceedings the applicant seeks a provisional order. For him to succeed he must establish a *prima-facie* right which entitles him to the provisional relief sought in the application. In the main he seeks the suspension of the Livestock Farming Concession Agreement (LJFCA) for ninety days. It was submitted that the order sought is to enable him to access CSC and carry out his duties as a corporate rescue practitioner.

[30] Mr *Mhungu* Counsel for the first respondent argued that CSC is not a party to the LJFCA, and as a result the applicant has no power to seek the present relief. It was submitted further that the relief the applicant is seeking could be sought if CSC was a party to the LJFCA, and it is not.

[31] The relief the applicant seeks is in terms of s 129(2)(a)(i) of the Insolvency Act which says:

> Subject to subsection (3), and despite any provision of an agreement to the contrary, during corporate rescue proceedings, the practitioner may—
> (a) entirely, partially or conditionally suspend, for the duration of the corporate rescue proceedings, any obligation of the company that—
> (i) arises under an agreement to which the company was a party at the commencement of the corporate rescue proceedings; and
> (ii)……... (My emphasis).

[32] The language of the empowering provision is plain and unambiguous, and it must be applied according to its terms. The language of the statute makes it clear that the relief sought by the applicant is available to a corporate rescue practitioner in respect of an agreement to which the company he is administering was a party at the commencement of the corporate rescue proceedings. It is common cause that the applicant is a corporate rescue practitioner of CSC, and that CSC was not and is not a party to the agreement that is sought to be suspended.

[33] In an attempt to by-pass this huddle Mr *Tavengwa* Counsel for the applicant submitted that the LJFCA was sealed for the benefit of CSC, and therefore this is a case of *stipulatio alteri*.

And therefore, on this basis the applicant has a right to seek the suspension of LJFCA in terms of the s 129(2)(b)(i) of the Insolvency Act.

[34] In *Loggenberg NO v Maree* (286/17) 2018 ZASCA 24) *stipulatio alteri* is defined as a contract for the benefit of a third party. It is clear that CSC is not a party to the LJFCA, however the agreement is for the benefit of CSC. Therefore, I agree that this is a case of *stipulatio alteri*. However, this is not the end of the inquiry and does not resolve the issue whether the applicant may seek the relief he is seeking in this application. It does not resolve the issue of privity of contract raised by the first respondent. In *TBIC Investments (Private) Limited & Ors v Mangenje & Ors* SC 13/18 the court said:

> "This brings us to the doctrine of privity of contract. That doctrine restricts the enforcement of contractual rights and remedies to the contracting parties, to the exclusion of third parties. The learned author Innocent Maja in his book The Law of Contract in Zimbabwe at p 27 para 1.5.3 graphically explains the doctrine as follows:
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> > "The doctrine of privity of contract provides that contractual remedies are enforceable only by or against parties to a contract, and not third parties, since contracts only create personal rights. According to Lilienthal, privity of contract is the general proposition that an agreement between A and B cannot be sued upon by C even though C would be benefited by its performance. Lilienthal further posts that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it.""

[35] In *Cargo Marketing International (Private) Limited v Dynamic Air Freight (Deutschland) GMBH* SC 170/97 the court said:

> I think it is necessary to remind ourselves that the doctrine of privity of contract generally means that a contract cannot confer any rights on one who is not a party to it, even though the very object of the contract may have been to benefit him.

[36] The ratio in *Cargo Marketing International (Private) Limited v Dynamic Air Freight (Deutschland) GMBH* (*supra*) applies with equal force in this case. CSC was is not a party to the LJFCA agreement. No doubt the agreement is for the benefit of CSC, but it is not a party

to it. The applicant as CSC corporate rescue practitioner may not seek to invoke s 29(2)(a)(i) to suspend the LJFCA agreement. This is so because the empowering provision is clear that it can only be invoked in a case where the company under corporate rescue proceedings was itself a party to the agreement when it was placed under such management. CSC was not a party to the LJFCA that is sought to be suspended.

[37. Mr *Tavengwa* argued that the first respondent is only opposed to the grant of paragraph 1 of the interim relief sought, suggesting that the other paragraphs can be granted. I do not agree. On the facts of this case the provisional order stands or falls as one. In fact, granting the remining paragraphs of the provisional order, will in effect be tantamount to granting the relief of the suspension of the LJFCA through the back door.

[38] In the circumstances, the applicant has not made a *prima facie* case for the provisional relief he is seeking. It is for these reasons that this application must fail at this stage.

[39] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. The first respondent has sought costs on a higher scale, on the facts of this case there is no justification for costs on such a scale. Accordingly, the applicant must pay the first and second respondent's costs.

In the result, it is ordered as follows:

The application be and is hereby dismissed with costs on a party and party scale.

Mutuso, Taruvinga & Mhiribidi, applicant's legal practitioners
Chasi Maguwudze Legal Practice, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners