SONENI NDLOVU
versus
B.D.P INVESTMENTS (PVT) LTD
and
TONDERAI BYRON RICE
and
NOMATHEMBA NCUBE
and
TALENT NDLOVU
and
THE REGISTRAR OF DEEDS
and
THE MASTER OF THE HIGH COURT
and
WIL AND COMPANY INSOLVENCY PRACTITIONERS

HIGH COURT OF ZIMBABWE
SIZIBA J
BULAWAYO 22 August 2024 & 29 August 2024

Urgent Chamber Application

Mr R. Moyo – Majwabu with Mr T. Dube for the applicant
Mr P. Madzivire for the 1st & 7th respondents
Mr D. Dube for the 2, 3rd & 4th respondents
No appearance for the 5th & 6th respondents

SIZIBA J:

INTRODUCTION

The applicant has approached this court seeking an urgent interdict in terms of a Provisional Order whose interim relief is couched as follows:

"The 5th Respondent (being the Registrar of Deeds) be and is hereby interdicted from appointing Wilfred Mafuka of Wil and Company or any other person to be the Business Rescue Practitioner of the 1st Respondent in terms of section 122 (3) of the Insolvency Act (Chapter 6:07) pending the determination of matter HC (Sum) 64/23"

The salient facts upon which this application must be determined are common cause. The applicant is the Executrix Dative of the estate late Memory Ngwenya who passed away on the 18th of July 2021. She was appointed to that office on the 18th of November 2021. During her lifetime, the late Memory Ngwenya had been the sole shareholder and secretary of the 1st respondent company. She was one of the two directors of the 1st respondent. After her demise, there was a Curator Bonis who was appointed by the Master of High Court to prepare a report about her assets. In February 2022, the 2nd, 3rd and 4th respondents through their consultants presented documents before the Registrar of Companies which led to their being appointed or confirmed as shareholders and directors of the 1st respondent. The applicant took umbrage against the 2nd, 3rd and 4th respondents and thereby filed an action under HC (Summ) 64/23 basically seeking to nullify such documentation and also their alleged fraudulent appointments as shareholders and directors of the 1st respondent. The said action is still pending before this court as it is to be allocated a date of hearing for the Pre-Trial Conference before a judge. On the 10th of July 2024, the parties signed a Joint Pre-Trial Conference Memorandum. The legal practitioners representing the applicant and those representing the 2nd, 3rd and 4th respondents are the same in both matters. What triggered the present application is that on the 17th of July 2024, the Board of Directors of the 1st respondent passed a resolution wherein they placed the 1st respondent under corporate rescue and also appointed one Wilfred Mafuka of the 7th respondent's business as the Corporate Rescue Practitioner of the company. A reading of the said resolution makes it clear that the only directors who passed such resolution are the 2nd, 3rd and 4th respondents. The applicant discovered this development upon visiting the 6th respondent's offices on the 8th of August 2024. She immediately alerted her legal practitioners who started corresponding with the 6th respondent so as to register applicant's complaint.

ARGUMENTS BY THE PARTIES

When the parties presented themselves to argue this matter on the 22nd of August 2024, I was of the view that the legal practitioners would successfully assist the parties to amicably resolve the matter. The court was adjourned to allow the parties to find each other but it seems that they became even further apart by that exercise. The parties were advised that the court would hear them concerning the point in *limine* taken by counsel for the 1st Respondent and also on the merits and that if the point in *limine* is upheld, the merits would not be considered but if the point in *limine* is dismissed, the merits shall be considered. This is a case where there is a very

thin line between the point in *limine* and the merits. The thrust of the 1st, 2nd, 3rd, 4th and the 7th respondent's opposition on the merits consist mainly of legal arguments which attempt to demonstrate that the application is not properly before the court. Counsel for the 2nd to the 4th respondents did not file opposing papers but made submissions from the bar.

The 1st respondent's main point in *limine* which was also taken up by the 2nd to the 4th respondents was that the applicant had not sought leave of this court nor obtained any authorization from the Master of High Court to institute the present proceedings and hence the application does not comply with section 126 of the Insolvency Act. It is argued further that the applicant's application should fail on the basis of its founding affidavit wherein she intends to interdict liquidation proceedings instead of corporate rescue proceedings. By and large, a proper reading of the applicant's papers does not support this contention. Both Mr Madzivire and Mr Dube's thrust in their oral submissions was that at law, corporate rescue proceedings commence by the mere filing of the resolution by the board of directors at the Master of the High Court's office which resolution also appoints the provisional corporate rescue practitioner. The case of *Metalon Gold Zimbabwe (Pvt) Ltd & Others* v *Shatirwa Inventments (Pvt) Ltd & Others* **SC – 107 – 21** was cited to support such submission. This position of the law was conceded by *Mr Majwabu* who appeared for the applicant. The concession was proper in my view. It was contended further by the respondents that the non - citation of Mr Wilfred Mufuka who is the provisional corporate rescue practitioner is fatal to the present application. Counsel for the respondents also submitted that there were cheaper and faster remedies available to the applicant through the Master's office. However, *Mr Majwabu's* submission was that the resolution which purported to place the 1st respondent under corporate rescue proceedings is null and void as the applicant was not notified of it as is required by the provisions of section 122 (5) of the Insolvency Act. This, according to counsel, meant that there were no valid corporate rescue proceedings. The respondents' position was that that applicant was not an interested party in terms of the Insolvency Act as she was neither a shareholder nor a creditor of the company. On the merits of the case, *Mr Majwabu's* contention was that if the respondents are not restrained from proceeding with the business rescue proceedings, the interests of the deceased estate which is represented by the applicant will be prejudiced as the assets of the company will be plundered by the 2nd, 3rd and 4th respondents before the pending action which seeks to determine the respective rights of the parties is dealt with.

THE APPLICABLE LAW AND CONCLUSION OF THE MATTER

This court will not lose sight of the fact that it is dealing with an urgent interdict whose requirements are trite in this jurisdiction. What the court needs to look for in this application is whether the applicant has a *prima facie* right, whether the applicant has alternative relief and if so, whether such relief is efficacious, whether irreparable harm has occurred or is apprehended upon the applicant as well as the balance of convenience. (See *Movement for Democratic Change (T) and Others* v *Timveous and Others* SC – 09 - 22). The arguments taken *in limine* must be viewed in this light.

The argument that the non - joinder of Mr Wilfred Mafuka who is the provisional corporate rescue practitioner of the 1st Respondent is fatal to this application is without merit. There is no fatal non joinder of a party in our law. The remedy for non - joinder or misjoinder of parties lies in the provisions of Rule 32 (11) and (12) of the High Court Rules, 2021. A party who feels strongly that another party should join any court proceedings may either apply for such joinder to the court or obtain a supporting affidavit from such party so as to advance his or her position. See *Mwazha and Others* **v** *Mhambare* SC – 116 – 21 at pages 8 and 9, *Wakatama and Others* v *Madamombe* 2011 (1) ZLR 18. A court of law is bound to decide the case for the parties before it although it must not grant an order that will prejudice the rights of a party who is not cited before it. See *Dynamos Football Club (Pvt) Ltd and Another* v *Zimbabwe Football Association and Others* 2006 (1) ZLR 346 (S). This point *in limine* is therefore dismissed.

The other preliminary argument taken by *Mr Madzivire* was that the grounds of the application which appear on the face of the application form are not short and concise as is required by the law. Counsel's argument on this line tended to impose the requirements of grounds of appeal upon the grounds of the application as if the failure to articulate clear and concise grounds of the application would be fatal to the application before this court. There is no such requirement in the rules of this court. This argument is also dismissed for lack of merit.

The major point *in limine* that has been taken by both counsels for the respondents is based on the simple literal interpretation of the provisions of section 126 of the Insolvency Act. It is the contention that the present application is incompetent at law as the applicant has not obtained leave to sue a company which is under corporate rescue proceedings either from this court or

from the corporate business rescue practitioner. Honestly, what is of concern about this point *in limine* and all the other technical defenses to this application is that the 2nd , 3rd , 4th respondents have clearly not acted in good faith in passing the resolution to place the 1st respondent under corporate rescue proceedings whilst well knowing that there is a pending action under HC (Summ) 64/23 which seeks to resolve the dispute as to whether their shares and directorship in that company were acquired lawfully or through forgery and fraud. These respondents ought not to have ventured to act in the manner that they did. What makes the whole transaction worrisome to this court is that these three respondents were the only directors who passed the resolution with no other independent person who is not cited as a party in the pending action. The pending action between the applicant and these respondents over the propriety of these respondents' shares and directorship status testifies to the fact that the applicant is an interested party who should have been served with the resolution to place the 1st respondent company under business rescue proceedings. *Mr Majwabu's* argument is that the interests of the deceased's estate are at stake. He contended that in terms of Article 27 of the 1st Respondent's Articles of Association, the shares of the deceased now vest in the applicant. The pleadings under HC (Summ) 64/23 show that what the applicant alleges is that the three respondents filed documents with the Registrar of Companies which were purportedly signed or prepared by the late Memory Ngwenya at a time when she had already passed on. The court is given the picture that the business rescue proceedings are merely meant by the 2nd, 3rd and 4th Respondents to circumvent the outcome of the pending action, whatever it may turn out to be. Such a process therefore would not be a genuine corporate rescue plan and concomitantly, the appointment of the corporate rescue practitioner under such circumstances would not be a valid process.

Mr Majwabu further submitted that a perusal of the papers filed at the 6th respondent's office show that the purported key creditor for the 1st respondent is the 2nd Respondent who also acted as the chairperson of the Board of Directors who passed the resolution that is the subject of this case. This is totally unacceptable at law. The purpose of the provisions of section 126 of the Insolvency Act is clear. It is to safeguard the financial interests of a company during its vulnerable state of affairs so that it may not be suffocated by its creditors through lawsuits. *In casu*, the business rescue proceedings are a smokescreen and a sham. The first disqualification to those proceedings is that they are not in good faith. The whole exercise bears a semblance of deceit and a lack of genuineness which is being masterminded behind the corporate veil of

the 1st respondent. Where there is a pending court case which would effectively resolve a dispute between the parties, any party who does any act or files any court process which tends to defeat the proper resolution of the matter on the merits will always be frowned upon by this court for his or her attempt to defeat the interests of justice. Furthermore, the failure to serve the applicant with the resolution concerned within the stipulated five - day period has the effect of invalidating the resolution. For these reasons, the point *in limine* to the effect that the applicant ought to have sought leave of this court to institute these proceedings is dismissed as there are no genuine and valid corporate rescue proceedings to be talked about. What is also mind boggling about this case is the unusual paradox that the very respondents who have vehemently opposed this application have also told the court that they have no interest in the outcome of the case since the 1st respondent is now under corporate business rescue. In reality, those who mourn and wail more than the bereaved are viewed with suspicion.

For the above reasons, it is apparent that the applicant is trying to protect the deceased's estate from being plundered by the 2nd to the 4th respondents prior to the finalization of the pending action. The mere fact that the applicant is an Executrix Dative of a deceased person who was a sole shareholder of the company is enough to establish her *prima facie* right at law. The reparable harm that has already occurred is the passing of the tainted resolution and the purported appointment of the provisional business rescue practitioner by the three respondents. However, there is irreparable harm which is apprehended if the assets of the 1st Respondent could be tempered with through a business rescue process that is tainted at law. The alternative remedies that are available in asking the applicant to seek leave from this court or permission from the provisional business rescue practitioner have no efficacy in my view. This is a matter which cannot wait. This court must grant interim protection to the applicant which is clearly merited on an urgent basis. The balance of convenience favours the applicant who stands to lose out if the assets of the 1st respondent are tempered with prior to the outcome of the pending action. The appointment of the business rescue practitioner, which currently has not been validly made as per the finding of this court, must be halted on an urgent basis pending the finalization of the pending action in HC (Summ) 64/23. During the hearing of this matter, applicant's counsel conceded that the manner in which the interim relief is couched in the draft Provisional Order leaves a lot to be desired. His prayer was that the interim relief should be amended to reflect that the 1st to the 4th respondents should be interdicted from appointing a corporate rescue practitioner. This proposed amendment was opposed by both counsel for the

respondents. At the end of the day, it is this court which must pronounce an order that is clear and effective and therefore the interim relief that I shall grant shall be as follows:

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

1. The purported appointment of Wilfred Mafuka of Wil and Company as the Business Rescue Practitioner of the 1st Respondent is set aside.
2. The 1st, 2nd, 3rd, 4th, 6th and 7th Respondents be and are hereby interdicted from appointing any person as the Business Rescue Practitioner for the 1st Respondent until case number HC (Summ) 64/23 is finalised.

James, Moyo-Majwabu & Nyoni, applicant's legal practitioners
Joel Pincus, Konson & Wolhurter, 1st & 7th respondents' legal practitioners
Dube Legal Practice, 2nd, 3rd and 4th respondents' legal practitioners