PETER ZHEKE
and
VICTOR ZIVANAI
and
PETER CHIRAKARAKA
versus
REDWING MINING COMPANY
(PRIVATE) LIMITED
and
MASTER OF HIGH COURT
and
THE REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 6 July & 8 December 2023

Court Application

R Mabwe, for the applicants
T Mpofu, for the 1st respondent

MANZUNZU J:

INTRODUCTION

This is a court application for the placement of the first respondent under corporate rescue proceedings in terms of s 121 as read with ss 124 and 131 of the Insolvency Act [*Chapter 6:07*]. The application is opposed by the first respondent.

BACKGROUND

The applicants are employees of Redwing Mining Company (Private) Limited (Redwing).The second and third respondents are cited in their official capacity.

On 23 July 2020 Redwing was placed under corporate rescue proceedings by an order of this court under case number HC 99/19. On 5 September 2022 the Supreme Court under case number SC 96/22 set aside the High Court order on the grounds that each affected person was not served with a standard notice as required in section 124 of the Insolvency Act and that the

trade union that represented the employees had no *locus standi* to bring the proceedings before the court.

The applicants allege that Redwing is in financial distress but also capable of being revived by corporate rescue.

NATURE OF THE APPLICATION

The application is brought in terms of s 124(1) of the Act which provides that;

> "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."

The applicants claim that they are affected persons as defined in section 121 of the Act which says

> "(1) In this Part
> (a) "affected person", in relation to a company, means—
> (i) a shareholder or creditor of the company; an"

The applicants say they are creditors of Redwing in that they are owed arrear salaries. In opposition, Redwing ring fenced itself with 6 preliminary points, the determination of which is the subject of this judgment.

POINT *IN LIMINE*

The following preliminary points were raised by Redwing;

a) Prescription
b) No causa
c) Fatal non-compliance
d) Non-joinder
e) Incompetent relief
f) Material non-disclosure.

I will now deal with these preliminary points in the order in which they were argued.

1. Fatal no-compliance with statutory provisions;

Mr Mpofu simply put the argument that the applicants did not comply with section 124 in respect to the service of affected persons with a standard notice. The relevant part of the section reads;

> "(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."

Compliance with this section is peremptory. In *Redwing Mining Company (Private) Limited* v *Associated Mine Workers Union of Zimbabwe* SC 96/22 the court went at length to explain the standard notice procedures required under this application. It said**:**

> "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"…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… 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."

From the foregoing, it is clear that failure to serve all affected parties by standard notice is

fatal to the application.

The onus is on the applicants to show that they have complied with s 124. The applicants failed to discharge the onus upon them. They admitted having served some of the affected persons but said were yet to serve others. The truth of the matter is that the applicants failed to comply with the strict provisions of the Act.

Ms Mabwe's argument that service can be done at any point in terms of s 124 (2) of the Act cannot hold water. This is so because s 124 goes further in subsection (3) to give rights to affected persons to participate at the hearing.

The preliminary point deserves a success.

2. Prescription

Redwing' argument is that the debts upon which the applicants claim to be affected persons has prescribed. Mr *Mpofu* submitted that the debts back date to 2018 and there was no interruption of prescription. The putative corporate rescue proceedings could not interrupt prescription because they were a nullity. Ms *Mabwe* submitted that the debts run up to 2022 because the corporate rescue proceedings were a nullity. In response Mr *Mpofu* argued the debts cannot be attributed to Redwing at a time it was under corporate rescue. This is despite the common position taken by the parties that the corporate rescue proceedings were a nullity.

I find no merit in this preliminary point which must be dismissed.

3. No Causa

This preliminary point has no merit. This is because, it was argued, the applicants' alleged debts arose during corporate rescue when the running of Redwing was not in the hands of management. But the Supreme Court ruled that the process was a nullity. Under this preliminary point the court heard more of the alleged misdemeanour of the corporate rescue practitioner more than the issue of causa.

4. Whether or not relief is Incompetent.

The relief sought has been challenged on its proposal for the appointment of one Knowledge Hofisi as the corporate rescue practitioner. This is because Hofisi was removed from such position and has not successfully challenged his removal. Even if this argument were to succeed, it does not dispose of the matter. If anything, it ought to have been argued as part of the merits. It has no merit as a preliminary point.

5. Material Non-Disclosure

The applicants did not disclose in their application the removal of Hofisi as a corporate rescue practitioner. Neither was there any mention of the tribute
agreement with Betterbrands Mining. The applicants were aware of the cash injection of US$973.223.59 disclosed at a meeting which they participated. This information is relevant in the determination of their application.

I agree with Mr *Mpofu* that the application at hand is a fact-based application. As a result, the applicants had a duty to disclose all the facts of the matter in aiding the court to come to a conclusion. See *ABSA Bank Ltd* v *Kensig 17 (Pyt) Ltd 2011 (4) SA 113.*
Courts have always expressed displeasure at litigants who withhold vital information which assists the court to do justice to the parties. In Anabus *Services (Pvt) Ltd* v *Minister of Health and Others HB88-03* the court remarked;

> "The courts should in my view always frown on an order whether ex-parte or not sought on incomplete information. It should discourage non-disclosure,*mala fides*, or dishonesty."

There is merit in this preliminary point and it must succeed.

6. Non-joinder

It was argued, Hofisi should have been joined as a party as a matter of necessity. This is because there are issues of accountability for the projected funds he received. His joinder does not effectively dispose of the case. The point must fail.

7. Locus Standi

This point was not independently argued either in the written heads or orally save to say it came clothed in the issue of prescription where it was argued the applicants were no longer affected persons, their debts having prescribed. It has already been determined that the debts have not prescribed hence the applicants by virtue of them being creditors have the *locus standi.*

CONCLUSION

The only successful preliminary points are non-compliance with statutory provisions and material non-disclosure. These warrant the dismissal of the application. The first respondent has not justified why costs should be punitive.

DISPOSITION

The application be and is hereby dismissed with costs.

Kadare Legal Practice, applicants' legal practitioners,
Scanlen & Holderness, first respondent's legal practitioners