OLIVER MASOMERA N.O

Versus

BEVERLY EAST PROPERTIES (PRIVATE) LIMITED

And

KAROI PROPERTIES PRIVATE LIMITED

And

BRIAN J RHODES PRIVATE LIMITED

And

THE MASTER OF THE HIGH COURT

And

THE REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHIRAWU-MUGOMBA J
Harare, 16 November, 18, 21 and 22 November 2022.

OPPOSED APPLICATION

C. Nhemwa, for the applicant
K.E Kadzere, for the 1st and 2nd respondents

CHIRAWU-MUGOMBA J:

1. This matter was initially placed before me on the unopposed motion matter. The applicant seeks the placement of the 1st-3rd respondents under supervision and commencement of corporate rescue proceedings in terms of section 124 of the Insolvency Act [*Chapter 6:07*].

2. At the hearing on the 3rd of August 2022, I raised certain queries in relation to the application. The matter was as a result removed from the roll. On the 7th of September 2022, the applicant filed a supplementary affidavit to address the queries.

3. The 1st and 2nd respondents filed their notice of opposition on the 21st of September 2022. On the 31st of October 2022, a hearing was convened. All parties acknowledged challenges on the new system of uploading documents. Accordingly, the late filing of the notice of opposition and filing of heads of argument by the 1st and 2nd respondent was condoned. The applicant was also afforded an opportunity to file an answering affidavit and supplementary heads of argument.

4. On the merits, the applicant contends that the 1st -3rd respondents are financially distressed but that there is a possibility of their rescue. Applicant proposes the appointment of one Cecil H. Madondo as the corporate rescue practitioner.

5. The applicant gives the following background in support of the application. That he is the executor of the estate of the late Brian James Rhodes, (Brian) DR1426/20 and that is the capacity in which he deposes to the founding affidavit.

6. That after the death of Brian, there was a scramble for his estate by directors of the 1st, 2nd and 3rd respondents, former employees and associates. Litigation was commenced under HC11589/13 (HH-424-13). In that matter TSANGA J accepted Phoenix Trust as a lawful shareholder of the 1st and 2nd respondents subject to the production of a valid trust document effected by the deceased.

7. There are other matters in the Magistrate Court and this court. The surviving spouse of Brian has been battling these many entities for control of the companies for years. Since the judgment of TSANGA J, the surviving spouse has not received a single cent and there is no proof that the trust deed was furnished to the Registrar of the High Court. Rentals are being collected and some properties have been disposed of. The trustees have also changed the CR14 (now CR6 form) alleging that the deceased resigned from the board well after his demise.

8. On the specific grounds for the application the applicant avers that the 1-rd respondents are holders of rights, title and interest in several commercial and industrial properties located in Masasa Harare, Karoi and Kariba. These were being leased to 3rd parties before the demise of Brian. However, the scramble for properties has led to loss of income because rent is being collected from tenants. However, statutory liabilities including taxes, municipal charges and related costs are not being remitted to the relevant entities.

9. There is a risk that the 1-3rd respondents will be sued by creditors. The companies run the risk of being placed in liquidation and yet there have a chance of being rehabilitated. They should therefore be placed under corporate rescue to enable a proper investigation into their affairs whilst the leases are properly managed. The deceased's wife supporting affidavit was attached to the application.

10. The 1st and 2nd respondents filed a notice of opposition. They raised three preliminary issues as follows.

a. The applicant has no *locus standi* because although he purports to be acting as an executor, he attached letters of confirmation reflecting that he is a *curator bonis* in the estate.

b. The applicant has not shown that he is an affected person for purposes of *s124* of the Insolvency Act. The estate of the deceased has not demonstrated that it is a shareholder in the 1st and 2nd respondents. The High Court has already made a decision in case no HC1589/13 on the shareholding of the 1st and 2nd respondents. This ruling remains extant. The proper applicant is the Phoenix Trust.

c. The applicant is effectively seeking to reverse the order in HC1589/13. This amounts to forum shopping. He challenged the High Court order and lost and he appealed to the Supreme Court and also lost. The same issues were ventilated and it is common cause that the applicant failed to prove that the estate is a shareholder in the 1st and 2nd respondents.

d. The applicant has failed to comply with the peremptory provisions of *s124(2)(b)* of the act in that he has failed to notify interested persons including the alleged creditors. As such, the application is fatally defective.

11. On the merits, the 1st and 2nd respondents made the following averments. That the application is devoid of merit as they are not in any financial distress as alleged. The real issue is that the applicant is attempting to gain control of the 1st and 2nd respondents so as to benefit from it. This is with the assistance of the deceased's spouse. This spouse at law is not entitled to the 1st and 2nd respondent by virtue of the law. These companies are separate legal

personas. In any event no proof has been attached showing proof that the estate is a shareholder.

12. The same issues already decided in HC1589/13 are being regurgitating by the applicant. The findings of the court have not been set aside.

13. The dispute between the trustees and the surviving spouse has nothing to do with the 1st and 2nd respondents' capabilities as a going concern.

14. No proof has been attached to show that the 1st and 2nd respondents have failed to meet statutory and other obligations. They have attached a list of alleged creditors that has no substance. Its contents have not been verified and its authenticity is questionable.

15. At the hearing Mr *Nhemwa* for the applicant submitted that there was no notice of opposition because the opposing affidavit was neither dated nor signed. Further that the deponent had no authority because of a fraudulently filed CR14. In response, Mr *Kadzere* submitted that the opposing affidavit was dated and signed. The commissioner of oaths had put the date on his stamp. As regards the CR14, it remained valid until set aside by the order of a competent court. The applicant raised the same issues in the Supreme Court appeal already alluded to but has failed to sustain them, therefore issue estoppel applies.

16. The court resolved the signing and dating of the opposing affidavit by requesting to see the physical copy. Mr *Nhemwa's* fears of tampering with the affidavit were allayed as the Mr *Kadzere* was physically present at the Commercial Court. He was directed to hand over the document to my assistant soon after the conclusion of the virtual session. Having perused the physical copy, I am satisfied that the affidavit was properly signed and commissioned. The issue of the alleged fraudulent CR14 in my view touches on the merits of the matter.

17. Mr *Kadzere* persisted with the preliminary points raised in the notice of opposition. On the attachment of letters of confirmation as *curator bonis* instead of executor, it is my considered view that the applicant clearly stated that he is approaching the court in his capacity as an executor. The fact that he attached a different document cannot be used to detain the court. I took note of the fact that he attached letters of administration to his answering affidavit.

18. The issue of shareholding is one which I believe is relevant to the merits of the matter. I hold the same view in relation to whether or not the applicant is an interested person.

19. I find reason however to deal with the issue of service of the application to all affected persons as a preliminary issue. Mr *Kadzere* submitted that if notice is not given, the application is fatally defective. Further that notice cannot be given after application has been opposed. He referred to an email purportedly sent on the 3rd of November 2011 and yet the application had been filled in July 2022. He moved for the dismissal of the matter on the strength of the Supreme Court judgment in *Metallon Gold and ors vs. Shatirwa Investments (Pvt) Ltd and Ors,* SC-107-21.

20. In response, Mr *Nhemwa* submitted that after the application was removed from the unopposed motion roll, there was a search of the affected persons. Service was done retrospectively and that cured the defect.

21. The court in the *Metallon* matter dealt extensively with the issue of service on affected persons as follows: -

> "The respondents failed to comply with the provisions of *s124(2)* of the Insolvency Act, which made their application a nullity as they failed to comply with peremptory provisions of the statute. *Section 124(2)* provides that:
>
> "(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**."
>
> Section 2 of the Insolvency Act provides that:
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> "'standard notice' means notice by registered mail, fax, e-mail or personal delivery."
>
> This provision shows that the court *a quo* misdirected itself when it found that neither the manner of notification nor the form or content of "standard notice" was defined in the Insolvency Act. The court *a quo* went on to express the view that there was a lacuna in the law that needed to be addressed by the Legislature as it created confusion in the procedure.
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> The court *a quo* failed to appreciate the statutory definition of standard notice as set out in s 2 of the Insolvency Act. 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.
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> 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 provisions of the Insolvency Act relating to notifying affected persons by standard notice renders the application a nullity.

22. An affected person as defined – see the *Metallon* case, (supra) has rights bestowed upon them. In the same matter an affected person was defined as follows, *"In terms of the Insolvency Act, there is no ambiguity as to whom 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 affected person therefore plays a dual role. They can either apply for the placement of a company under corporate rescue in terms of *s124(1)* and if not, they should be served with a copy of the application. Therefore, it is critical for a court to determine whether indeed affected persons as defined have been notified in the manner set out by the law.

23. In *casu,* the applicant attached an email in an answering affidavit dated the 3rd of November 2022. In my view and as rightly submitted by Mr *Kadzere,* the applicant cannot be allowed to serve retrospectively. Before the matter turned into an opposed one, I had raised the issue of service of the application. As soon as the matter became opposed, service could not be effected retrospectively. In any event, there is no indication that service was effected on a registered trade union or employees of the 1st to the 3rd respondents. Section 129 of the act shows that employees rights may be severely affected by corporate rescue.

24. Mr *Kadzere* submitted that the non-compliance by the applicant with the peremptory requirements to serve on affected parties is fatal to proceedings as per the *Metallon* case *(supra).* Accordingly, on that basis, the application must be dismissed with costs.

DISPOSITION

1. The application for corporate rescue be and is hereby dismissed.
2. The applicant shall pay the costs.

C. Nhemwa and Associates, applicant's legal practitioners

Kadzere, Hungwe and Mandevere, 1st and 2nd respondents' legal practitioners