COMMUNICATION AND ALLIED SERVICE
WORKERS UNION OF ZIMBABWE
versus
TELECEL ZIMBABWE (PRIVATE) LIMITED
and
MASTER OF THE HIGH COURT
and
THE REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 11 & 18 October 2023

COURT APPLICATION

Adv. R Mabwe, for Applicant
Adv. E T Matinenga, for the 1st Respondent

MANZUNZU J

The applicant, (the Union) seeks an order placing the 1st respondent, (Telecel) on corporate rescue in terms of section 124 (1) of the Insolvency Act, Chapter 6:07 (the Act). The Union contends that the requirements of section 124 (4) (a) of the Act are met in that Telecel is financially distressed. The Union claims to have *locus standi* as a creditor and a registered trade union representing Telecel employees.

Telecel opposes the application and raised three preliminary points which is the subject of this ruling.

WHETHER THE APPLICATION LAPSED FOR NON COMPLIANCE WITH RULE 35 (5)

Rule 35 (5) of the High Court (Commercial Division) Rules, 2020 provides that:
"(5) Except in exceptional circumstances, and subject to these rules or any direction as may be given by a judge, including on the question of costs, an application or counter-application that is issued out of court shall lapse after a period of six months from the date of issue unless it is set down for hearing in accordance with these rules."
Advocate Matinenga's simple approach to this rule was that in the absence of special circumstances, if the applicant fails to set the application within 6 months from the date of issue, then the application lapses for failure to comply with the peremptory provisions of the rule. In *casu*, the application was filed on 10 October 2022 and the notice of set down was on 23 May 2023. It was further argued for Telecel that the computation of the 6 months is one found in section 33 (6) of the Interpretation Act, Chapter 1:01 which states that:

> *"(6) In an enactment—*
> *(a)* …
> *(b)* …
> *(c) a reference to a month shall be construed as a reference to a calendar month; "*

Advocate Matinenga was detailed in his persuasive argument about the peremptory nature of rule 35 (5). He said the court must look at the skim of things which is addressed by a particular statute. In that respect he relied on the authority of *Sterling Products International Ltd v Zulu 1988 (2) ZLR 293.*

Advocate Mabwe in response, while accepting that the Commercial Court must deal with commercial disputes expeditiously, said there are exceptional circumstances. She conceded that the application was filed in October 2022 but said Telecel's financial statements were only availed in March 2023. She further said the set down was further interrupted by the vacation period in April. Counsel further urged the court to revert to section 176 of the Constitution which allows the court to regulate its own processes. The other dimension by counsel was that rule 35 (1) (2) (3) and (4) call for amendment. This is more so because rule 223 referred to in sub rule (2) no longer exists. In any event, it was argued, Telecel cannot insist with compliance of the statute when the matter is already set down and the parties are already before the court for hearing. The act of setting down the matter, it was also argued, meant the court had condoned the non compliance.

Unfortunately, I did not find any valid contestation of this preliminary point from all angles taken by Advocate Mabwe. Her arguments were not water tight and remained generalized. She has not particularized her argument. For example, she said the vacation interrupted the filing of the notice of set down, but no reference was made to any particular rule. She did not even advise the court the exact period of vacation. As a matter of fact, vacation ended on 7 May 2023 and yet the notice of set down was filed on 23 May 2023.

Nevertheless, I am glad that both senior counsels understand and fully appreciate why this division of the High Court was created. It's no longer business as usual. The function of the court is guided by a set of values set out in the 2nd schedule of the Rules. Some of which I recite hereunder:

> *"(1) The establishment of the Commercial Court in Zimbabwe is designed to improve the ease of doing business in line with the criteria set by the World Bank and contribute towards the national effort in attracting local and foreign direct investment.*
>
> *(2) The core function of the Commercial Court is the <u>expeditious resolution</u> of commercial disputes according to international best practices to enhance efficient justice delivery." (emphasis is mine).*

Throughout the rules of this division emphasis is on "*expeditious resolution*".

Rule 4 (3) speaks to the need for the court to be guided by the set of values in the following words;

> "*(3) The court shall in administering these rules, have due regard to the set of values set out in the Second Schedule to these rules and the need to achieve substantial justice inter parties in any particular case without derogating from the principles of natural justice or established law and resolving the dispute timeously."*
>
> The issue of time is further reinforced by rule 17 (2) which says,
> *" (2) A dispute shall proceed and be determined within a period of ten months, and in any event not more than twelve (12) months, from the date of commencement."*

Strict time lines are drawn in the filing of any pleading with consequences against any party who fails to meet the *dies induciae.*

So it is all about the quick disposal of cases. This is why the rules of this court have embraced one of the cardinal principles of judicial case management in that judges become active case managers as opposed to taking a passive role where the pace of litigation is litigant driven.

It cannot be denied that the Union failed to comply with rule 35 (5) and that no exceptional circumstances have been shown to exist. The preliminary point must succeed.

LOCUS STANDI

Once the *locus standi* of the applicant is challenged, the onus is upon the said applicant to show that it has the *locus standi* to institute the proceedings against the respondent. In defending its position, the Union said it was a creditor and representative of the employees and as such section 124 of the Act allows it to institute these proceedings. Section 124 (1) of the Act provides that, *"(1) Unless a company has adopted a resolution contemplated in section 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."(underlining is mine).*

> "*Affected person*" is defined in section 121 of the Act thus:
> *"(a) "affected person", in relation to a company, means—*
>
> *(i) a shareholder or creditor of the company; and*
> *(ii) any registered trade union representing employees of the company; and*
> *(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;"(emphasis is mine).*

In the founding affidavit, the Union attached a list of employees it said was representing. Advocate Matinenga's argument was that the list was no evidential proof that the Union was authorized by its members to bring this action. For this sentiment he referred to *Chisvo and Others v Aurex (Pvt) Ltd and Anor 1999 (2) ZLR 334 (H) at 338* where Gillespie J, as he then was, had this to say; *"The rule permitting a party to sue or representing numerous others who have the same interest but who are not parties to the proceedings is intended as a "flexible rule of convenience." It is designed to permit the attainment of a judgment binding, but not executable without leave, on persons in consimili casu without the need for a multiplicity of trials or an extended trial with a multiplicity of parties. A prior direction appointing a representative is not necessary, but may well be expedient or desirable. No requirements are prescribed as to proof of the authority of the purported representative to act in that capacity, nor as to the submission of any party, said to be represented to the judgment of the court. Nevertheless, proof of such authorisation should be regarded as indispensable, since a court, particularly if the point is raised by the other party, will be scrupulously cautious not to make an order on a person who is not a party and not otherwise amenable to that order. If the court is not satisfied as to the capacity to represent the party concerned, not only will it refuse judgment but might forbid the continuation of proceedings…. What can never be sufficient is simply a list of names. Unsigned. Unauthenticated. And that is what I have here. A typewritten roll of 255 names. It is quite valueless."*

Despite this hard push to the wall, all Advocate Mabwe could say in response was that she will abide with the written heads. The written heads on the point of locus standi is very brief and is in no way a response to the legal objections raised by Telecel. All what the Union says is that it was owed some money being subscriptions on behalf its members which debt was settled by Telecel.

The preliminary point is bound to resoundingly succeed.

NOTIFICATION OF CREDITORS

Section 124 (2) of the Act puts it in peremptory terms that the company and certain office bearers must be served with the application and affected persons must be notified of the same. The section states;

> *"(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."*

"Standard notice" is defined in section 2 of the Act to mean; *"notice by registered mail, fax, e-mail or personal delivery."*

Telecel's preliminary point regarding the standard notice is that not every creditor was served with the standard notice, such as employees who were not members of the Union and shareholders. It was admitted by the Union, as at 1 November 2022, the date of filing the answering affidavit, that it was still in the process of serving other creditors. The Union's stance is that service can be done at any time. Such an approach negates the essence of serving the standard notice.

The Union despite its admission in paragraph 11 of the answering affidavit that it had identified around 370 creditors, it did not show that all the affected persons were served. Failure to serve the affected persons nullifies the corporate rescue application. This position, Advocate Matinenga supported with the authority of *Metallon Gold Zimbabwe (Private) Limited and three Others v Shatirwa (Private) Limited,SC 107/21* where the court had this to say;

> *"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."*

A similar approach was followed in Redwing Mining Company (Pvt) Ltd v Associated Mine Workers Union of Zimbabwe and 2 Ors, SC 96/22 where the court also said*;* "*The*

applicant for corporate rescue has an obligation to notify all affected persons and the first respondent failed in this regard. See Top Trailers (Pty) Ltd and Anor v Kotze [2017] ZAGPPHC 1268. The consequence of failure to comply with the peremptory and clear provisions of the Act is that the application was a nullity."

Advocate Mabwe adopted the written heads. One can only understand the difficulty in which counsel found herself in. She had no instructions to make concessions in situations where a concession should be the most appropriate thing to do.

Once again this preliminary point has merit and must be upheld.

CONCLUSION

At the end of every preliminary point Telecel asked the court to dismiss the application with costs. The Union asked, in the event the preliminary points succeeding, that the application be struck off the roll. The Union failed to follow the peremptory provisions of the Act which renders the application a nullity. This situation is similar to what obtains in the Metallon Gold case (supra) and Redwing Mining Company case (supra) where the Supreme Court dismissed the applications.

DISPOSITION

The application be and is hereby dismissed with costs.

Gumbo & Associates, Applicant Legal Practitioners

Honey & Blanckenberg, 1st Responden's Legal Practitioners.