AMCAST (PRIVATE) LIMITED t/a AMCAST MINE
versus
ZIMBABWE DIAMOND AND ALLIED WORKERS UNION
and
THE MASTER OF HIGH COURT N.O.
and
THE REGISTRAR OF COMPANIES N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 22 March 2022 and 6 October 2023

Opposed application

Mr *T K Hove*, for the applicants
Ms *S Evans*, for the respondent

CHINAMORA J:

This application concerns the rescission of a court order dated 19 October 2022 under HC 6383/22 placing the applicant under corporate rescue. The aforesaid order has a clause providing for the appointment of the corporate rescue practitioner, namely, Obert Madondo. In addition, the order subjects the applicant to the supervision, management and control of the corporate rescue practitioner as provided for by the Insolvency Act [*Chapter 6:07*].

The applicant filed this application and one Vaibhav Shantilal Harsora (hereinafter referred to as "Harsora") deposed to the applicant's founding affidavit. In essence, Harsora stated that he is a director of the applicant and, in that capacity, he was authorized to depose to the affidavit. The applicant invoked Rule 29 (1) (a) of the High Court Rules, 2021. The applicant averred that, sometime in September 2021, it entered into a deed of settlement in the sum of USD 14 000.00. This was in respect of money that was due to 15 employees. In addition, the applicant alleges that it paid the sum of USD 8 450.00. On 25 October 2022, the first respondent filed an application

(under HC 6383/22) placing the applicant under corporate rescue. The application was premised on the basis that the applicant failed to pay the outstanding balance. It was contended that the applicant did not receive the application, despite a certificate of service which was in the record, which stated that service was effected on number 5 Hurtsview Road, Harare. The applicant argued that the application ought to have been served on number 1 Chiriseri Road, Virginia Turnoff, Glendale, Mazowe which is the *domicilium* of the applicant.

Further, the applicant stated that the application was served by the Sheriff by affixing on the letter box at a wrong address, as aforesaid. As a result, the applicant did not see the court application until the first respondent called him and wrote asking for financial statements to commence the corporate rescue. The applicant asserted that it had direct and substantial interest in the proceedings but did not receive the court application. It is further contended that the application in HC 6383/22 did not comply with the procedure prescribed by the Insolvency Act. It was submitted that the first respondent was privy to its financial status. Consequently, the contention was that there is no way that the first respondent would conclude that applicant was under financial distress. The applicant alleges that it has prospects of success on the basis that it made part payments towards settling what was due to the first respondent's employees. It added that it was ready to settle the outstanding balance. Lastly, applicant argued that the first respondent will suffer no prejudice if the application was granted. It is on these grounds that the applicant prays for the rescission of the default judgment; the removal of the applicant from corporate rescue; and that the applicant be allowed to file its notice of opposition together with its opposing affidavit.

The second and third respondents did not oppose the application. On the other hand, the fourth respondent opposed this application and raised three preliminary points, namely; that (a) the deponent lacked authority to act on behalf of the applicant; (b) the application was prematurely filed; and the respondent has dirty hands. On the merits, the first respondent contends that the Board of Directors was divested of its powers by the placing of the applicant under corporate rescue proceedings. As a consequence, the board of directors could not purport to have passed a resolution in favour of Harsora to represent the company. The first respondent further contends that applicant was part of the proceedings as service was effected by the Sheriff of the High Court at its known address of service. As a result, the order was not erroneously granted. In support of this position, the 1st respondent avers that the return of service is sufficient proof that the applicant

was served and, in particular, the deponent of the affidavit resides at the address upon which the application was received the application. In this respect, s20 (3) of the High Court Act [*Chapter 7:06*] provides that the Sheriff's return of service shall be prima facie evidence of what it states to have been done by the Sheriff, his deputy or assistant. Additionally, the first respondent stated that applicant's representative, Harsora, met with its representatives on 14 October 2020 and requested the withdrawal of the matter under HC 6383/22. Those representatives turned down the request on the basis that the matter was now *subjudice*. It was also stated that, on 15 October 2022, the applicant's representative sought legal advice on the matter from Lawman Law Chambers. Because of this, it was contended that the applicant cannot purport to have been unaware of the corporate rescue proceedings.

Thus, the first respondent argues that the present application is an abuse of court process, in that the applicant was aware of the application well before the *dies induciae* expired. It is first respondent submission that, in order to succeed, the applicant must show that the company is financially stable and out of distress. In summation, it is the first respondent's case that applicant ought to demonstrate a sound financial position which reveals that the company now has sufficient funds to resume commercial mining operations as opposed to gold panning. In fact, the court has to be satisfied that it has enough funds to meet capital and operational expenditures to cater for its medium to long term capital requirements. In addition, there must be evidence showing that it has managed to service all its debts and cleared itself on all matters pending in courts and that it has paid all employment-related obligations, including unremitted contributions to MIPF, WCIF, ZIMDEF, NEC for mining industry, NSSA, ZIMRA tax obligations and ZESA. It is on these grounds that the first respondent prays that the application be dismissed with costs.

Let me now deal with the preliminary points. I propose to firstly address the challenge to the deponent's authority to act on behalf of the applicant. The starting point is section 130 (2) of the Insolvency Act which is a deeming provision which provides that:

> "During a company's corporate rescue proceedings the board of the company will be deemed to be dissolved, and each director of the company –
>
> (a) may no longer exercise the functions of director; and
> (b) may only exercise a management function within the company in accordance with the express instructions or direction of the corporate rescue practitioner, to the extent that it is reasonable to do so."

Further, I need to relate to s 130 (4), which provides that, if during a company's corporate rescue proceedings, one or more directors of the company at the time the corporate rescue proceedings commenced purports to take any action on behalf of the company, that action is void unless approved by the corporate rescue practitioner. It is evident from the provisions of the Insolvency Act that I have referred to, that the control of the company shifts to the corporate rescue practitioner when a company is under corporate rescue. Whilst the Companies and Other Business Entities Act *[Chapter 24:13*] confers original powers on the board to manage the business affairs of a company, and to exercise all the company's powers and function, this has to pay regard to the Insolvency Act. In this connection, s 130 (2) of the Insolvency Act gives the corporate rescue practitioner full management powers and duties to run a company in financial distress for the duration of the corporate rescue process.

Apparent from the foregoing is that first respondent contends that the deponent to applicant's founding affidavit lacks authority to depose to applicant's affidavit is properly founded at law. As highlighted above, this proposition is anchored on the fact that when a company is placed under corporate rescue, it ceases to have a life of its own. In other words, it cannot operate on a "business as usual basis", completely aloof to the existence of the new corporate rescue regime. The legal reality, however, is that once corporate rescue proceedings commence, the directors are divested of their powers, and there cannot be any board resolutions to talk about. The affairs of the company will from that moment vest in the corporate rescue practitioner. Therefore, any action taken by the directors during the corporate rescue process without the approval of the corporate rescue practitioner is null and void. In *casu*, Harsora submitted that he is a director of the applicant and, in that capacity, he is authorized to depose the affidavit. The relevant part of the resolution tendered a proof of the deponent reads:

> "**IT WAS RESOLVED:**
>
> THAT, VAIBHAV SHANTILAL HARSORA, in his capacity as the Director of the Company respectively, be and is hereby authorized to sign all legal documents, depose to affdavits (sic) and appear in Court on behalf of the Amcast (Pvt) Ltd in any matter between Zimbabwe Diamond and Allied Minerals Workers Union and Amcast (Pvt) Ltd…"

A perfunctory reading of the resolution shows that it was pursuant to a meeting of the board of directors of Amcast (Pvt) Ltd, whose powers were divested by the appointment of the corporate rescue practitioner. Clearly, the actions of Harsora were not approved by the corporate rescue practitioner, Obert Madondo. In terms of s130 (4) such action is void. Having come to the conclusion that the deponent to applicant's affidavit had no authority or approval of the corporate rescue practitioner, the application is fatally defective. I will decide the applicant on the basis of this point in *limine* alone. I find it unnecessary to deal with the remaining preliminary points or the merits of the application. As I have resolved the matter on the basis of the aforesaid preliminary point, there is no application before the court. I must also mention that, as I have determined the main application, namely, the application for rescission of judgment, there is no longer a need to decide the urgent chamber application.

In the result, I make the following order

1. The application in HC8407/22 is struck off the roll with costs.

T K Hove & Partners, applicant's legal practitioners
Mabuye Zvarevashe-Evans, first respondent's legal practitioners