REPORTABLE **(57)**

MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
v
(1) JULIANA MUSKWE (2) NTOMBIZODWA MASUKU
(3) EDWARD TOME (4) ANDREW LAWSON
(5) MESSINA INVESTMENTS LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & KUDYA JA
HARARE: 14 SEPTEMBER 2020 & 17 JUNE 2022

T. Magwaliba, for the appellant

T. Mpofu, for the first, second, third and fifth respondents

E. Mubaiwa, for the fourth respondent

KUDYA JA: On 12 February 2020, the High Court dismissed with costs an application for the confirmation of the Reconstruction Order (RO) issued on 26 October 2018, by the appellant in terms of s 4 of the Reconstruction of State-Indebted Insolvent Companies Act *[Chapter 24:27]* (the Act), against Hwange Colliery Company Ltd. The present appeal seeks to upend that judgment.

THE FACTUAL BACKGROUND

The appellant is the Minister of Justice, Legal and Parliamentary Affairs. The first three respondents (the directors) are board members of Hwange Colliery Company Ltd (Hwange or the Company). The fourth respondent is a chartered accountant, who was the scheme chairperson and is the Trustee appointed by the scheme creditors to represent their collective interest in the implementation of the Scheme of Arrangement that preceded the Reconstruction Order (RO). The fifth respondent is the second largest shareholder in Hwange after the Government of Zimbabwe (GOZ). The nominal shareholder of GOZ is the Minister of Mines and Mining Development (the Minister). He is also the regulator of all mining companies in Zimbabwe.

Hwange is a coal mining conglomerate and a strategic national asset that supplies coal to the Zimbabwe Power Company (ZPC) for the generation of 400MW of electricity and to commerce, industry and agriculture. It has a triple listing on the local, Johannesburg and London bourses, holds untapped concessions measuring over 22 000 hectares in extent and owns and manages a sizable property portfolio and a profitable hospital in Hwange Town.

The Company operated profitably between 2009 and 2012. Between 2013 and 2016, due to a host of reasons attributable in the main to antiquated equipment, undercapitalization and poor management, the Company suffered endemic losses that peaked at US$100 million in 2015 before tapering off to US$ 87 million in 2016. During that period, coal production fell from an average of 500 000 to 200 000 metric tons (MT) per month. As at 31 December 2016, it owed its creditors, who consisted of the Government of Zimbabwe (GOZ), statutory and trading creditors, financial institutions and employees a total sum of US$353 million.

On 26 April 2017, the shareholders and the creditors approved by the requisite margin the s 191(1) of the Companies Act *[Chapter 24:03]* Scheme of Arrangement (the scheme). The scheme was predicated on a three-pronged strategy of raising capital, restructuring management, and rescheduling and settling debt.

On 3 May 2017, the Company filed a court application, in terms of s 191(2) of the Companies Act [*Chapter 24:03]*, for the sanctioning of the scheme. The order was granted on 10 May 2017.

On 26 October 2018, prompted by the minister, and acting purportedly in terms of s 4 the Act, the appellant published an RO against the Company in the Government Gazette Extraordinary. He simultaneously notified and invited all interested parties to obtain all relevant accompanying documents from the Attorney General's Office in Harare.

The directors were immediately divested of all their powers and authority, which were vested in the administrator Bhekithemba Moyo and his two assistants Munashe Shava and Ms Mutsa Remba.

On 22 November 2018, in compliance with s 8 (3)(a) of the Act, the appellant sought the confirmation of his RO. It was contested by the respondents.

THE ARGUMENTS *A QUO*

The respondents took several preliminary points *a quo,* against the confirmation of the RO.

The directors and the fifth respondent contended that Part II of the Act violated the provisions of ss 56(1) (the equality and right to equal protection clause), 68(1) (the right to administrative justice clause), 69(1) (right to a fair hearing before an independent and impartial tribunal clause) and 71(1) (the right to the protection of private property) of the Constitution of

Zimbabwe. They contended that the power reposed in GOZ by the impugned provisions to act as both a prosecutor and a judge in its own cause and to unilaterally circumvent the *audi alteram partem* rule was inconsistent with these constitutional provisions. They further contended that the application did not disclose a cause of action in the face of an extant court order sanctioning the scheme. They additionally contended that s 2(a) of the Act constituted an insurmountable hurdle for the appellant. They also contended that the invocation of the Act in favour of one shareholder constituted an abuse of authority. Finally, they argued that the appellant's failure to make the material disclosure of the *mala fides* the minister harboured against them arising from some alleged impropriety he committed during his chairmanship of the board between 13 May 2016 and 8 December 2017 (when he assumed ministerial office), rendered the RO a nullity.

The fourth respondent made common cause with the directors in regard to the negation of the *audi alteram partem rule,* the constitutional, administrative and statutory rights of members, the hurdle against confirmation posed by an extant court order, the effect of s 2(a) of the Act and the consequent registration of the scheme with the Registrar of Companies in terms of s 191(3) of the Companies Act.

The appellant also raised preliminary points against the fourth and fifth respondents. He argued that the fourth respondent did not have the *locus standi* to oppose the confirmation proceedings. He was no longer a chairman of the scheme but a trustee who was not empowered by the trust deed or the trust beneficiaries to contest confirmation. He sought to non-suit the fifth respondent for failing to paginate and index his opposing papers in breach of the peremptory provisions of the r 227(d) of the High Court Rules, 1971. He disputed that the court order was extant contending that it had either been abandoned by conduct or was not the kind of court order that required rescission. He contested all the preliminary points taken by the respondents against him.

On the merits the appellant made the following arguments. The scheme had failed to turn around the fortunes of Hwange due to mismanagement for which the directors were ultimately responsible. Being the largest shareholder and creditor, GOZ could not countenance the delays associated with the legal process for the dissolution of the scheme that was specified in the trust deed to which it was a party.

He was impelled by the exigencies of the situation to act with speed to protect the public investment and a national strategic asset. It was in the interest of the Company and all stakeholders that the board be prevented from asset stripping the housing estate, concentrating their attention in increasing board representation instead of production and firing senior management (3 within a space of 18 months) willy-nilly.

The Company could be saved from falling down the financial and economic precipice by confirmation of the RO rather than by the sterile notices of the decline flighted by the fourth respondent in the local print media for the attention of the debenture holders. In any event, the scheme being a compromise arrangement did not require a court order to discharge it. The acknowledged failures in implementing the scheme amounted to a repudiation and abandonment of the scheme by the Company, which negated the application of s 2 (a) of the Act.

The appellant further contends that the jurisdictional facts prescribed in s 4 (1) of the Act had been met. These were demonstrated by firstly, the foreclosure by the Central Africa

Building Society (CABS) of the US$4 million off shore loan for the purchase of mining equipment advanced on 27 February 2018, which was guaranteed by GOZ. Secondly, by the recommendation of the scheme lawyers to abandon the scheme in favour of judicial management. He, therefore, submitted that it was just and equitable and in the interests of GOZ, creditors, employees, consumers, the local community and the market for the RO, which was under the management of a competent administrator, to be confirmed than risk judicial management under an incompetent board.

The directors contended that the appellant had failed to establish the irreparable harm that necessitated the initial abridgment of the *audi alteram partem* rule. He did not avail nor disclose the detailed contents of the report he received from the minister to the respondents or the court. He, therefore failed to justify that the RO was just, fair and reasonable. His reliance on the preliminary report showed that he issued the RO without full facts. The fortunes of the Company (both financial and production), contrary to the conclusions rendered in the preliminary report, comparative to prior periods, markedly improved during the short period that it was under the scheme. It was duplicitous of the appellant to ignore the economic environment under which the Company operated, which was fully known to the minister in his previous capacity as the board chairperson and from periodic reports he received from the board in his new position. Further, that it was presumptuous of the appellant to attempt to predict that the Company would be unable to retire the debentures or the principal debt on their respective due dates, some 8, 10, 15 or 25 years into the future. The principal debt was not yet due. The minister together with the other debenture holders were obliged by clause 6.1 of the trust deed to either enforce or dissolve the scheme before rooting for an RO. The managing director and two senior executives had resigned to avoid pending misconduct charges for derailing the implementation of the scheme. These appeared to be the "blue-eyed boys" of the minister whom he wanted retained despite their serious acts of misconduct. The numerous successes of the board in the implementation of the scheme was testimony to their ability to turn the Company back to profitability. The required board increase was prescribed in the articles of association. The RO was an unjust and inequitable tool used to help the minister remove the directors outside the prescripts of the articles of association.

They sought the discharge of the RO to enable the momentum gathered by the Company under the scheme to continue.

The fourth respondent premised his argument that a single creditor could not properly seek the annulment of the scheme without the collective consent of the body of creditors on the authority of *Parker v WBG Kinsey & Co (Pvt) Ltd* 1987 (1) ZLR 188 (S) at 200A-B. He further argued that the appellant lacked the legal standing to represent statutory creditors, who in any event had consciously subscribed to the scheme. He further argued that the RO was predicated on a wrong basis.

The fifth respondent argued that the jurisdictional facts for invoking s 4 (1) of the Act were not met. The scheme rather than the RO was the panacea to the misfortunes of the Company as it was a multilateral agreement of a conspectus of all the affected stakeholders and not a unilateral act of state prescribed by a single creditor. The RO was costly, unjust and inequitable as it eroded shareholder value and constituted a veritable backdoor expropriation of the equity of other shareholders by GOZ.

In rebuttal, the appellant conceded in his written heads of argument (p 307 of the appeal record) that the principal debt was not yet due but strongly argued that he placed the Company under an RO for breaching the requirement to pay interest on the debentures of US$6 million due on 10 May 2018. He refuted the contention that the RO was open ended and perpetual by making reference to ss 24 (3) and (4), and 35 of the Act, which contemplate the expeditious implementation of remedial measures by the Administrator to restore the Company to viability and for the appellant to discharge the confirmed RO once the objectives were or were not to be achieved. He conceded the inevitable fact that reconstruction came at an added cost to the Company.

THE FINDINGS OF THE COURT *A QUO*

The court *a quo* discarded "trivial time-wasting" preliminary points and engaged those of substance that were capable of resolving the dispute between the parties. On the preliminary points taken by the appellant, it made the following findings. The fourth respondent had *locus standi* to oppose the application only as a trustee in terms of clause 8.1 of the trust deed and as an interested party identified in s 8 (2) of the Act. Clause 3.7.6 as read with 8.1 of the trust deed conferred upon him the general common law powers of a trustee and specific powers that allowed him to protect the collective interests of the debenture holders or beneficiaries of the trust; a point conceded by the appellant in para 3.2.3 of the answering affidavit on p 251 of record. That, although the fifth respondent's papers were in breach of r 227 (2) (d) of the High Court Rules, it was in the interests of justice to condone the breach.

The court *a quo* dismissed the preliminary points taken by the respondents in respect of the constitutionality of the relevant provisions of the Act for two reasons. The first was that such challenges could only be moved in a founding affidavit by way of a counterclaim and not in an opposing affidavit. See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B. The second was that the constitutional challenges had been disposed of by this Court in *African Resources Ltd & Ors v Gwaradzimba NO & Ors* 2011 (1) ZLR 105 (S).

It found that the absence of the minister's report or its contents constituted the Achilles heel of the application. It, consequently, held that the appellant failed to establish the necessity for negating the *audi alteram partem* rule and jurisdictional facts due to the absence of the minister's report or its factual contents. It upheld the preliminary point that the RO violated s 2 (a) of the Act and was, therefore, invalid as it was issued after 17 months and not within 30 days of the filing of the application for sanctioning the scheme with the High Court. It dismissed the submission that the scheme had been abandoned.

It held that even though the fourth respondent had failed to establish the registration of the scheme with the Registrar of Companies that did not remove the bar posed by s 2 (a) of the Act. It further reasoned that the failure to register the scheme could be corrected by registration thereof at any time subsequent to the granting of the court sanctioned order. It, therefore, held that the RO could not be confirmed in the face of an extant court order sanctioning the scheme. It, thus, dismissed the application with costs.

Dissatisfied by the adverse findings made against him, the appellant appealed to this Court on the basis of the following 5 grounds of appeal.

THE GROUNDS OF APPEAL

1. The court *a quo* erred in concluding that the failure by the appellant to attach to his founding affidavit the written report from the Minister of Mines and Mining Development, which he considered at the time when he placed Hwange Colliery Company Limited (Hwange) under a reconstruction order, was fatal to the application for confirmation of the reconstruction order, when s 8(2) of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*] (the Act) does not require the appellant to place before the court the exact evidence he considered at the time of imposing the reconstruction order, but rather, merely a statement of the reasons why he placed the company under construction, howsoever he may wish to prove that statement.
2. The court *a quo* misdirected itself in concluding that the reconstruction order was premised on nothing, and that therefore the application before the court showed that Hwange, a State-indebted company of monumental importance to the nation of Zimbabwe as a whole, was in the financial doldrums, was unable to pay its debts and could possibly be restored to its status as a going concern if placed under reconstruction.
3. The court *a quo* erred in recognizing that there was a scheme of arrangement in place in respect of Hwange when the scheme, not having been registered with the Registrar of Companies as prescribed in terms of s 191(3) of the Companies Act *[Chapter 24:03*], had not come into effect at law.
4. The court *a quo* erred in finding that the failure by the appellant to first apply for the setting aside of the court order granted by the High Court under HC 5012/16 relating to the sanctioning of the scheme of arrangement in respect of Hwange, before placing it under a reconstruction order, was fatal to the application for confirmation of the reconstruction

order when an order sanctioning a scheme of arrangement need not first be set aside in order for the court sanctioned scheme of arrangement to cease to be operational.

5. The court *a quo* erred in finding that the reconstruction order violated the provisions of s 2 of the Act when those provisions relate to a scenario where the need for reconstruction order arises within thirty days of the making of the application for the sanctioning of a scheme of arrangement, whereas on the facts before the court *a quo*, the need to place Hwange under reconstruction arose well after the company had been placed under reconstruction.

He sought the success of the appeal, the vacation of the order *a quo* and its substitution with an order confirming the RO and a joint and several costs order against the respondents.

THE ISSUES

The sole issue that arises from all the 5 grounds of appeal is whether the court *a quo* erred in refusing to confirm the RO.

THE ARGUMENTS ON APPEAL

Mr *Magwaliba*, for the appellant, basically raised three points before the court. The first, which was premised on the third ground of appeal, was that the scheme did not constitute a bar against the issuance of an RO by the appellant. He argued that as the court *a quo* found that the scheme was not registered with the Registrar of Companies, the provisions of s 2 (a) of the Act could not constitute a bar against the RO. He submitted that the court *a quo* was, therefore, wrong to dismiss the application. He made the alternative argument that having found that the RO was a nullity, the court *a quo* should have struck the application off the roll instead of dismissing it. He also submitted that it was remiss of the court *a quo* to determine the merits of the matter after adjudging it a nullity.

The second, which related to the fourth and fifth grounds of appeal was that, the interpretation of s 2 (a) of the Act rendered *a quo* would result in a glaring absurdity arising from the insertion of the word “not” by the court *a quo* to the provisions of that section. Counsel argued that while the section allowed the appellant to issue an RO within 30 days of the institution in the High Court of the application to sanction the scheme, it did not stop him from doing so after the expiration of the 30 day period. He contended that the court *a quo* misconstrued the section because it wrongly inserted the word “not” in the closing words of the proviso to s 2 between “shall” and “apply” and rendered it to read:

> “Shall <u>not</u> apply to such company, unless within 30 days of the date of the presentation of the petition or the making of the application, the Minister issues a reconstruction order in respect of the company.” (Underlining for emphasis)

He argued that the absurdity would be that an extant scheme would constitute a permanent and perpetual bar against the exercise of the appellant’s power in suitable and needful situations. In engagements with the court, counsel conceded that despite the erroneous insertion of the word “’not”, the construction rendered *a quo* was correct. He, however, maintained that the scheme was not legally effectual because it had not been registered with the Registrar of Companies as mandated by s 191(3) of the Companies Act and the alternative argument that it had been abandoned.

The third, which was based on the first and second grounds of appeal, was that the finding *a quo* that the RO was predicated on nothing went against the substantial reasons and the copious information availed by the appellant in the application. He argued that the preliminary report disclosed that the company was in poor financial health at the time the RO was issued. He submitted that the cumulative effect of the unaudited 2018 mid-term financials, the breaches of the scheme of arrangement and the recommendation of the scheme legal practitioners of 13 September 2018, to the board were all symptomatic of mismanagement, which had propelled the company to the verge of collapse. This information, so the argument went, not only overshadowed the absence of the minister's report but went far beyond the mere statement of reasons required of the appellant by s 8 (2) of the Act. Counsel maintained that the evidence adduced *a quo* demonstrated that the appellant had properly exercised his discretion in issuing the RO.

Per contra, Mr *Mpofu* for the directors and the fifth respondent contended in the main that, the appeal flounders on the proper construction of s 2 (a) of the Act, which precludes the appellant from issuing an RO in the face of an extant scheme. He further argued that the appellant had failed to establish any of the cognizable grounds on which this Court could interfere with the exercise of discretion *a quo*. He also contended that the absence of the cogent evidence upon which the RO rested showed that the appellant had acted arbitrarily. He further argued that although GOZ was the regulator it was also a contractual party to the court sanctioned scheme. It was, so he argued, bound by the agreed terms and could only repudiate it and seek rescission for cognizable contractual reasons. It was also bound by the principle of legality to issue an RO in conformity with the law and precluded by the self-same principle from using public power to avoid its contractual obligations to the prejudice of other contracting parties.

He also argued that the jurisdictional facts upon which the application for confirmation could be based were not met. That, as in terms of clause 7.2.3 of the scheme document, the scheme had a life span of 5 years, it could not properly be adjudged a failure after only operating for one year. The failure to fund the Cash Collection Account (CCA), from which interest on the debentures would be paid and to pay arrear salaries during the months of August and September 2018, had been caused by the managing director and finance executive who had viremented funds destined to these accounts without the authority of the board. The board had taken remedial action and instituted disciplinary measures that precipitated the resignation of the offending officials. He also argued that these purported failures were eclipsed by the many successes that were enumerated in the preliminary report and the 2018 mid-term unaudited financial report, and did not constitute vital breaches that went to the root of the scheme.

He strongly argued that the appellant could not plead the *causa* of a failed and abandoned scheme and argue another unpleaded *causa* based on non-registration. He further argued that the appellant could not be allowed to approbate and reprobate his way through the case *a quo* and on appeal. He opined that the appellant took two inconsistent positions, one based on the pleadings and another raised for the first time *a quo* in argument. He argued that the general thrust of his pleaded case, implicit in para 20 of his founding affidavit, was that the scheme had been registered while in argument he contended that it had not been so registered. The non-registration argument contradicted the conduct of GOZ of conscientiously fulfilling its scheme undertakings. These undertakings to the knowledge of the minister could only be implemented after registration of the scheme with the Registrar of Companies. This position was clearly set out in clauses 4.3, 8.6 and 10.1.4 of the notice of scheme, and subsequently replicated as conditions precedent to the implementation of the scheme by clauses 4.1.3 and 6.1.4 of the scheme document attached to the court sanctioned order.

He also argued that the RO was harmful to the interest of shareholders who could no longer trade in their shares.

In his estimation, the application was rightly dismissed and not struck off even though the finding was reached on the basis of a preliminary point, because the court *a quo* had also adverted to the merits.

Mr *Mubaiwa*, for the fourth respondent argued that: the impugned judgment was rational and supported by evidence; the relief sought on appeal was unlawful in that it violated the provisions of s 2 (a) of the Act. The facts disclosed that the appellant improperly and irrationally exercised the discretion reposed on him by s 4 (1) of the Act. He mistook or misapplied the facts. He erroneously regarded the principal debt as due. He irrationally attributed the failure to fund the CCA to mismanagement when it was due to causes beyond the control of the board such as the harsh operating economic environment and the time lap between purchasing, delivery and commissioning of new equipment. These adversely affected the envisaged production targets and affected the bottom line. The appellant did not meet the s 4 (1) requirements. The scheme needed to be set aside before the RO could be issued. And lastly, it was on record that the court order had been delivered to the Registrar of Companies on 18 May 2017 and the requisite fee paid.

In rebuttal, Mr *Magwaliba* made the following contentions. The scheme was a legal nullity because it had not been registered with the Registrar of Companies. The statutory requirement to seek representations before issuing an RO, in the absence of irreparable harm, was due to the Company and not to individuals. Statutory corporations fall into the ambit of State–indebted entities by virtue of the definition of that term in the Act. He conceded that the appellant raised the issue of non-registration in his heads of argument for the first time *a quo*. He, however, sought to avoid the confession by contending that the main *causa* pleaded *a quo* was in any event the default in meeting the scheme obligations that were due at the time the RO was issued. He also conceded that the preliminary report was not and could not be used to invoke the RO.

ANALYSIS OF THE LAW AND THE FACTS

It seems to me that the proper construction and application of s 2 of the Act to the common cause facts is dispositive of the appeal.

Initially, counsel for the appellant argued that s 2 did not preclude the appellant from issuing the RO. In engagements with the court on the point, he conceded that the appellant could not issue an RO outside the 30-day period prescribed in s 2. It was, therefore, common cause that as long as the conditions precedent prescribed in s 2 were met by s 191(2) of the Companies Act scheme, the appellant was precluded from issuing an RO. This would be the position notwithstanding the existence of the jurisdictional facts that are prescribed in s 4 of the Act.

Before setting out the provisions of s 2 of the Act, it is appropriate to reproduce the relevant provisions of s 191 of the Companies Act. It stipulated that:

"**191 Power to compromise with creditors and members**

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors or of the members

of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by duly authorized agent or proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or class of creditors or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) **An order made under subsection (2) shall have no effect until a copy of the order certified by the registrar of the court, together with a copy of the deed of compromise or arrangement, as the case may be, has been delivered to the Registrar for registration and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made.**

(4) If a company makes default in complying with subsection (3) the company and every officer of the company who is in default shall be guilty of an offence and liable to a fine not exceeding level one for each copy in respect of which default is made." (My emphasis)

There is a noticeable progression from subs (1) to (3) of s 191 from an initial court order to convene a scheme of arrangement through the sanctioning of such a scheme to its registration with the Registrar of Companies.

Subs (4) criminalizes the failure to register the scheme and penalizes the company and every official of the company whose duty it is to do so. This, in my view, is a sure sign that the order must be obeyed. This subsection codifies the common law principle that court orders must be obeyed. The principle was articulated by LORD RADCLIFFE in *Smith v East Elloe Rural District Council* [1956] AC 736 at 769 thus**:**

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of illegality on its forehead. Unless the necessary procedures are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

In our jurisdiction, the principle bears the status of a constitutional command by virtue of s 164 (3) of the Constitution, 2013, which stipulates that:

> "(3) An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them."

It seems to me that the failure to register does not discharge the sanctioning order. It remains in abeyance, until so registered or until set aside by an order of court. The latter alternative finds expression in the words of STRYDOM J in *Administrateur - Generaal vir die Gebied Suidwes - Afrika v Hotel Onduri (Edms) Bpk en Andere* 1983 (4) SA 794 (SWA) at 801 G-H, that:

> "The sanction of the Court is necessary to effectively bring this about and although it is not an order *ad factum praestandum* which by non-compliance would be punishable with contempt of Court, ... the Court still grants its approval thereto, and in view of the effect which it has, it is my view that only the Court can undo the compromise by setting it aside….. The compromise therefore comes into existence by an order of Court, and cannot be set aside by the parties without an order of court."

These two complementary positions were adopted and approved by GUBBAY JA, as he then was, in *Parker v WBG Kinsey & Co (Pvt) Ltd, supra,* at 194, 197C and 199B and 200B. I derive the following principles from this case.

1. The judicially sanctioned scheme of arrangement must be registered pursuant to the relevant section of the Companies Act.
2. The sanctioned scheme is not an order of court *ad factum praestandum,* a contravention of which is punishable by contempt of court.
3. It is a court recognized consensual contract, which binds the creditors and the Company by operation of law and is governed by the legal principles that apply to all contracts.
4. A disgruntled party is entitled to seek rescission for any perceived essential breach going to the root of the contractual arrangement, especially where there are other interested

parties, See *Sonia (Pty) Ltd v Wheeler* 1958 (1) 555 (A) at 561A-C and Christie *The Law of Contract in South Africa* at p 520.

5. The High Court has the power to set it aside for material or essential breach. Minor administrative failings that do not go to the root of the scheme do not undermine the validity of the scheme nor warrant its cancellation. Otherwise it is unimpeachable until it has been set aside. See *Administrateur - Generaal vir die Gebied Suidwes - Afrika v Hotel Onduri (Edms) Bpk en Andere, supra.*

6. A court is only likely to consider the setting aside of a judicially sanctioned compromise, even for a vital breach thereof that is made at the instance of the majority in number and three-fourths in value of the creditors rather than that of a single creditor.

Section 2 of the Act states that:

"**2 Application**

This Act shall apply to all State-indebted companies, including those formed or incorporated before the date of commencement of this Act and regardless of when they became indebted to the State:

Provided that if in relation to a State-indebted company there is made or presented to the court-

- **(*a*) an application in terms of section 191 of the Act for the sanctioning of a compromise or arrangement proposed between the company and its creditors or members, sections 191 to 194 of the Act; or**
- (*b*) a petition for the winding up of the company in terms of section 207 of the Act, Part V or VI of the Act; or
- (*c*) an application for a provisional judicial management order in terms of section 299 of the Act, Part V or VI of the Act;

shall apply to such company unless, within thirty days of the date of presentation of the petition or the making of the application, as the case may be, the Minister issues a reconstruction order in respect of the company. (My emphasis)

I accept the common cause meaning ascribed by the parties to the highlighted portions of the section. It is that, a consideration of the section as a whole, in clear and unambiguous terms, excludes from the broad reach of the Act a State-indebted company that has made or presented an application to the High Court for the sanctioning of a scheme of arrangements unless the appellant issues an RO within 30 days of the date on which such an application is filed. Where, however, the appellant does not exercise his right, then the scheme of arrangement must abide with the provisions prescribed in ss 191 to 194.

In my considered view, the rationale for excluding the invocation of an RO in the face of an application for a scheme of arrangement or liquidation or judicial management is obvious. Like a reconstruction order, these three fall into the genre of corporate rescue measures. It would not only be illogical but undesirable to have two or more of these corporate rescue plans run parallel or in competition with each other. The legislature, in its wisdom, however, decided to provide the appellant with an opportunity to implement a reconstruction process but only to a State-indebted company within the specified window period of 30 days. The effect of doing so would be to suspend any impending application made in terms of any of the other three categories of corporate rescue.

In the present matter, the application for the sanctioning of the scheme of arrangement was filed in the High Court on 3 May 2017. It was then sanctioned on 10 May 2017. The appellant had 30 days to 2 June 2017 to exercise his s 2(a) right to place the Company under an RO. He, however, issued the impugned RO on 26 October 2018. He did so not within 30 days but within 541 days of the presentation of the s 191 (2) application to the High Court. He was woefully out of time.

It is well settled in this jurisdiction that any action done in contravention of the peremptory provisions of a statute is invalid. See *Guoxing Gong v Mayor Logistics (Pvt) Ltd* SC 2/2017 at p 6, *Mtetwa & Anor v Mupamhadzi* 2007 (1) ZLR 253 (S) at 255B, *Schierhout v Minister of Justice* 1926 AD 99 at 109 and Maxwell *Interpretation of Statutes*, 7 ed p 316.

In this regard, the court a quo, rightly remarked that:

> "The order which the minister issued seventeen (17) months into the scheme of arrangement, no doubt violates s 2 (a) of the Act. The section it has already been stated, is peremptory. It admits of no discretion on the part of the Minister. It is trite that an order which is issued in direct violation of the law stands on no leg. It is a nullity. Similarly, an application which is premised on a nullity cannot stand. Nothing begets nothing…...It is by parity of reasoning, evident that the application which the Minister made to confirm a nullity cannot stand. It will simply collapse. It will do so on the basis that the foundation upon which it is predicated does not exist. The court, in other words, cannot confirm a nothing."

I am satisfied that the appellant misconstrued s 2 (a) of the Act and, therefore, acted contrary to statute. The RO was, therefore, invalid before it was even issued. The appeal would fail on this basis.

Mr *Magwaliba*, however, made two alternative contentions. The first was that the scheme had been abandoned at the time the RO was issued. The second was that the failure to register the court order sanctioning the scheme and its attachment as prescribed by s 191(3) rendered the scheme ineffectual. *Per contra*, both Mr *Mpofu* and Mr *Mubaiwa* refuted these alternative contentions. They argued that the scheme was alive at the time the RO was issued and that it had been registered.

I proceed to deal with each alternative contention *ad seriatim*.

The bases for the abandonment submission was that, firstly, the Company had breached the scheme by defaulting on the payment of interest that was due by 10 May 2018, after the prescribed one-year moratorium on interest payments had elapsed. The second was that, the scheme legal practitioners had by letter of 21 September 2018 recommended the Company to invoke provisional judicial management measures because the scheme had failed. The appellant, so the argument went, had therefore taken the view that the scheme had been abandoned. It was in that light, that he felt impelled by the exigencies of the situation to issue the RO without notifying interested stakeholders. He formed the reasonable suspicion that the Company could only be rescued from failure and returned to viability by instituting reconstruction measures.

I agree with the respondents that the abandonment argument is contrary to the second alternative argument. It is a contradiction of terms to argue that a scheme that was never effected under s 191(3) could be abandoned. It is an anathema to our law for a party to approbate and reprobate. See *S v Marutsi* 1990 (2) ZLR 370 at 374B, *Alliance Insurance v Imperial Plastics (Pvt) Ltd & Anor* SC 30/17 at p 7 and *Bodwitch v Peel & Magill* 1921 AD 561 at 573.

The founding affidavit, on which an applicant's case can only be made and on which the appellant's case was predicated, alludes to a functional scheme albeit beset with teething problems. Indeed, the preliminary report by the Administrator of 19 November 2018 not only speaks to a scheme that "was implemented in 2017" but also enumerates 17 successes. The press reports flighted by the fourth respondent of 9 May 2018 and 9 October 2018, speak to a functional scheme. The appellant failed to provide evidence of express abandonment or of abandonment by conduct. The first alternative submission ought to be dismissed for lack of merit.

The second is premised on the finding of the court *a quo* that the fourth respondent had failed to provide proof and, therefore, evidence of registration of the court sanctioned order.

In a bid to establish registration, the respondents attempted to produce on appeal from the bar proof of the submission made on 18 May 2017, of the order and scheme documents to the Registrar of Companies. The appellant opposed the attempt. The court had sight of the letter addressed to the Registrar of Companies but in deference to the spirited opposition from the counsel for the appellant, declined to admit it into or consider it as evidence. After the matter had been reserved for judgment, of its own accord, the appellant addressed a letter to the Registrar of this Court attaching its correspondence to the Registrar of Companies, who disputed that the scheme had been filed or deposited at his registry. This was in spite of the endorsement of his date stamp to the attachments consisting of the court order, scheme document and a computer generated receipt from his office. The appellant erroneously suggested that the Court had directed him to submit, post the hearing, evidence regarding such registration.

This Court did not make any such directions. It was, therefore, remiss of the appellant's erstwhile legal practitioners to suggest that this Court had done so. I express this Court's displeasure at the conduct of the Director for the Civil Division of the Attorney-General's Office who wrote the misleading letters to both the Registrar of Companies and of this Court by adopting the remarks made by this Court in analogous circumstances in *Zimcor Trustees Ltd & Ors v Rushesha & Ors* SC 22/15 at p 4 that:

> "There can be no doubt whatsoever that the approach taken by Advocate *Mpofu*, without opposing counsel's consent and, more importantly, without seeking the leave of this Court, is highly irregular and profoundly objectionable. It deserves the strictest censure and might even warrant disciplinary action under different circumstances. For purposes of the present

> appeal, however, it suffices that Advocate *Mpofu* be severely reprimanded and cautioned against any similar conduct in the future."

I substitute Ms *V. Munyoro* for Advocate *Mpofu*.

The point that arises is that while the court *a quo* made a finding of fact that the fourth respondent had not established registration of the scheme in terms of s 191 (3), it nevertheless held that such failure did not affect the validity and effectiveness of the extant court order. It found that the order was a veritable hurdle against the issuance of the RO.

I am alive to the fact that the respondents have not and could not have cross-appealed against this factual finding. However, in my view, the finding was incorrect, for the following reasons. In our law, an applicant's case is made in the founding affidavit and not in the answering affidavit or heads of argument. See *Director of Hospital Services v Mistry* 1979 (1) SA 626(A) at 635H-636B, *Jackson v Rothmans Of Pall Mall (Zimbabwe) (Pvt) Ltd* 1993 (2) ZLR 156 (S) at 161D-F and *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd & Ors* SC 2006 (1) ZLR 372 (S) at 378D-E.

In the court *a quo*, the appellant's case, in the founding affidavit, was not premised upon the non-registration of the scheme with the Registrar of Companies. Rather, it posited registration as a given fact. Indeed, even when the fourth and fifth respondents raised the fact of registration in their opposing affidavits, the appellant did not dispute it in his answering affidavit. He could not do so in the light of the concession made by the Administrator in annexure ZZ, a press publication entitled "Comment on Publication by Andrew Lawson", on p 268 of the appeal record, which the appellant produced and adopted in para 3.6.7 of his answering affidavit. The administrator wrote that:

> "Mr. Lawson presided as chairman of scheme meetings held on 26 April 2017, <u>and his role was discharged upon </u>presentation of his report to the High Court on 3 May 2017 and <u>registration of the scheme in terms of s 192 (3) of the Companies Act thereafter</u>." (My underlining for emphasis)

On the authority of *Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors* 1993 (2) ZLR 121 (S) at 127F, it is a settled principle of our law that:

> "what is not denied in affidavits must be taken to have been admitted."

And, according to *Mining Industry Pension Fund v DAB Marketing (Pvt) Ltd* 2012 (2) ZLR 132 (S) at 138G such an admission:

> "prevents the leading of any further evidence to prove or disprove the admitted facts. It is conclusive of the facts admitted."

The argument advanced *a quo* and, in this Court, that the respondents were required to prove registration was a red herring. In any event, in the light of my finding on the correct construction of s 2(a) of the Act, it is not the registration of the scheme that bars the appellant from issuing an RO, but the appellant's failure to curtail the filing of the application for the sanctioning of the scheme within the prescribed period of 30 days that does so. Whether or not the scheme was registered becomes irrelevant in the resolution of the appeal.

In the light of the above findings, I do not consider it necessary to determine the other sub-issues, which were raised by the appellant in argument in this Court such as whether the provisions of ss 4 (1) and 8 (2) of the Act were met.

COSTS

I see no reason why costs at the ordinary scale should not follow the result.

DISPOSITION

Clearly, the appellant could not issue an RO in the face of a s 191 (2) application outside the 30-day period from the date of such filing. He did so in contravention of the peremptory provisions of s 2(a) of the Act.

I, however, agree with Mr *Magwaliba* that a striking off order ought to have ensued *a quo*. This accords with the provisions of s 8 (4) of the Act, which appear to allow the appellant the proverbial second bite to the cherry in the event that the RO is not confirmed. The subsection provides that:

> "(4) A decision by a judge not to issue a confirming order in terms of subsection (1), or to issue it subject to any amendment or variation, shall not prevent the Minister from making a fresh application in terms of that subsection on the basis of new evidence obtained since the original application, or to correct any mistake in the original application, and subsections (1) and (2) shall apply to such fresh application.

In the circumstances, I would invoke the provisions of s 22 (1) (a) of the Supreme Court Act *[Chapter 7:13]* to correct the order granted *a quo*. See *Mariyapera v Eddies Pfugari (Pvt) Ltd& Anor* SC3/14 at p 3.

Accordingly, the following order will ensue:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the first to fifth respondents' costs on the ordinary scale.
3. The order of the court *a quo* is set aside and substituted with the following:

"The application is struck off the roll with costs."

GWAUNZA DCJ: I agree

MATHONSI JA: I agree

Civil Division of the Attorney-General's Office, appellant's legal practitioners.

Chinyama & Partners, 1st, 2nd, and 3rd respondents' legal practitioners.

GN Mhlotshwa & Company, 4th respondent's legal practitioners.

Mushoriwa Pasi, 5th respondent's legal practitioners.