SOUTHVIEW HOLDINGS (PVT) LTD
(Formerly Costain Africa (Pvt) Ltd)
versus
WESLEY S SIBANDA
(In his capacity as the Judicial Manager of Ceezed Construction (Pvt) Ltd)
and
CEEZED CONSTRUCTION (PVT) LTD
and
CZL INCORPORATED (PVT) LTD
and
THE MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 16 January 2018 & 13 November 2019

Opposed Court Application

T Magwaliba, for the applicant
J Bamu, for the 1st, 2nd & 3rd respondents

CHITAPI J: The applicant prays for an order as set out in a fairly lengthy draft order which is worded as follows:

1. It be and is hereby declared that the provisional orders granted on 8 October and 17 December 2014 respectively placing the second and third respondents under provisional judicial management lapsed on 29 April 2015 and 11 March 2015 and are accordingly no longer of any legal force and effect.
2. It be and is hereby declared that the appointment of the first respondent as the final judicial manager of the second and third respondents be and is hereby set aside.
3. The cancellation of the lease agreement between the applicant and the second respondent be and is hereby confirmed.
4. The second respondent shall give the applicant vacant possession of No. 87 Plymouth Road, Southerton, Harare, within 48 hours of service of this order upon it.

5. If the second respondent or any person occupying the property through it remains on the property after 48 hours of service of this order upon the second respondent, the Sheriff is authorised to remove him/them and his/their possessions from the property.
6. The second respondent shall pay the applicant the sums of US$862 734.27 and US$159 282.20 being arrear rentals and municipal charges respectively for the period extending from 1 April 2011 to 31 January 2016, that being the date of cancellation of the lease agreement.
7. The second respondent shall pay the applicant holding over damages at the rate of US$12 000.00 *per* month plus VAT from 1 February 2016 to the date it vacates or is ejected from the property.
8. The second respondent shall pay interest on the sums of money due by it to the applicant at the rates of 17% *per* annum on amounts that were due and owing up to 31 December 2014and at the rate of 15% *per* annum on amounts of money that became due and owing from 1 January 2015, the interest rates being 2 percentage points above the applicant's Commercial Bank's Prime Lending Rate on all amounts in arrears.
9. The second respondent shall pay collection commission on all sums of money due by it to the applicant and legal costs on a legal practitioner and client scale.
10. It be and is hereby declared that the transfer of the second respondent's assets and business to the third respondent was unlawful and that the transfer be set aside.
11. The payments due and owing the second respondent in terms of this order maybe recovered by execution against the assets that were unlawfully transferred and which are presently sitting in the third respondent's asset register.

The first, second and third respondents opposed the application.

The application raises a number of technical legal arguments on *inter alia,* whether or not the first respondent's appointment as final judicial manager of the second and third respondents should be set aside. The heart of the matter however lies in the claim by the applicant against the second respondent for payment of arrear rentals and municipal charges in the amounts respectively of US$862 734.27 and US$159 282.00 accrued in the period from 1 April 2011 to 31 January 2016. In the heart of the claim is included claims for holding over damages and ancillary relief which includes but is not limited to the cancellation of a lease agreement between the applicant and second respondent and the second respondent's ejectment from the leased premises, to include the ejectment of any and all persons claiming rights of occupation from the premises through the second respondent. The otherwise straightforward

claim as briefly set out has resulted in the respondents avoidance of the liability for the claim on the basis of legal consequences of the second and third respondents having been placed under judicial management with the first respondent as judicial manager hence his citation as a party in the capacity of judicial manager of second respondent.

The material facts of the matter are not in dispute. They may be summarised as follows. The applicant, second and third respondents are limited liability companies registered and domiciled in Zimbabwe. The first respondent is the final judicial manager of the second and third respondent's companies. It was alleged in para 7 of the applicant's founding affidavit and admitted in para 7 of the opposing affidavit of the first respondent that the assets of the second respondent were unlawfully transferred to the third respondent. The first respondent averred that it was for the reason of the unlawful transfer of the assets as aforesaid that the third respondent was then also placed under judicial management as had been done to the second respondent. The first respondent avers that he was appointed as judicial manager for both the seconds and third respondent companies.

Prior to the second respondent being placed under judicial management, it was a tenant of the applicant in respect of applicant's immovable property called stand 5901 Salisbury Township, also known as 87 Plymouth Road, Southerton, Harare. The tenancy relationship was governed by a written lease agreement executed between the applicant and the second respondent on 31 March 2011. A copy of the lease agreement was attached as Annexure 'C' to the applicant's founding affidavit. The lease agreement was to terminate after 5 years on 31 March 2016. The lease rental was in the sum of US$12 000.00 *per* month excluding value added tax (VAT). In addition, the second respondent as lessee was obliged to pay service charges in the manner of water and other municipal charges. The first respondent admitted the applicants' assertion that the lease agreement was lawfully terminated by the applicant for breach by the second respondent in defaulting making rental payments. The first respondent did not dispute the amounts claimed by the applicant. The applicant in response to the factual background of the claim for arrear rentals and ancillary charges as set out in paras 9, 10, 11, 12 and 13 stated as follows in para 9 of the opposing affidavit at p 80 of the consolidated record—

> "**9 Ad paragraphs 9, 10, 11, 12 and 13**
> These paras raise no issue, save to state that as the judicial manager I am aware of the applicant's claim. The applicant submitted its claim which was accepted by the master and is being considered. The amount owing is still subject to a proper analysis. That will be subject to consultations between my office and the applicant. At an appropriate time, all the creditors who are owed will be paid. As judicial manager I am ceased (sic) with fundraising in an effort to raise enough funds to pay creditors including the applicant."

It must therefore be recorded that subject to verification of the amount claimed by the applicant, the liability of the second respondent on the debt was admitted by the first respondent in his capacity of judicial manager. In this regard, one fails to understand why the first respondent would not consent to an order for the ejectment of the second respondent in the light of the admission by the first respondent of a valid cancellation of the lease agreement and the continued non-payment of rentals. The *bona fides* of the first respondent is called into question in his defence of the matter, in this regard, legal points *in limine* raised put aside. It is certainly not the duty of the judicial manager to continue to incur and accumulate debt to the detriment of the entity which is being judicially managed. It is also contrary to the duties of the judicial manager to conduct the affairs of the company under judicial management in a manner which unduly prejudices creditors. Judicial management is basically a company rescue tool. The first respondent in para 9 of the opposing affidavit simply stated that all creditors will be paid at an appropriate time after he has raised enough funds to pay creditors. The first respondent did not relate to any justification for the continued occupation of the applicant's premises without paying rent and incurring of further arrear rentals, let alone to justify why the second respondent should not be ejected from the premises since the lease agreement was validly cancelled. The judicial manager has a duty to act impartially see *Alison* v *Nicholson* 1969 RLR 446, which means that he or she must consider and safeguard the interests of both the company and creditors against financial prejudice. I must hold in consequence of the admitted non-payment of rentals and valid cancellation of the lease agreement that the second respondent decidedly remains in unlawful occupation of the applicant's premisesand has not advanced legal justification to remain in occupation of the premises.

The parties have raised hair splitting arguments both factual and legal in what is clearly a straightforward matter. I say that the matter is straight forward because when all has been said and done, the applicants' interest is to recover its property from unlawful occupation by the second respondent and unpaid and holding over rental which was incurred and continues to be incurred by reason of the continued occupation of applicant's property by the second respondent as already alluded to. I must consider whether the first and second respondents have valid legal cause to avoid an order for eviction and payment of accrued rental as well as holding over damages.

The issues which arise in argument are legal. In the first instance, the applicant submits that the provisional orders issued by this court dated 8 October, 2014 and 17 December, 2014 wherein the second and third respondents were placed under judicial management lapsed

respectively on 29 April, 2015 and 11 March, 2015. The applicant prays for a declaratory order to that effect. In consequence of the declaration sought, the applicant prays for the setting aside of the appointment of the first respondent as final judicial manager of second and third respondents. In other words, the applicant's argument is that, if the provisional judicial management orders as aforesaid lapsed on the pleaded dates, that became the end of the matter and any subsequent processes including the appointment of the first respondent as final judicial manager were of no force or effect since they were premised upon an invalid process of confirmation of the provisional orders made beyond their life spans. In support of its position, the applicant quoted the celebrated judgment of Lord Denning in *Mcfoy* v *United Africa Co. Ltd* 1961 (3) AER 1109 at 1172 wherein the learned judge stated –

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

The principle has been embraced in this jurisdiction. See *Mugwebi* v *Seed Co Ltd and Anor* 2000 (1) ZLR 93 (S), *Mutyasira* v *Gonyora* HH 180/2014; *Stella Hapaguti* v *Cecil Madondo and Anor* HH 94/15; *Marko Mavhurume* v *Mukoti & 2 Ors* HH 199/2011; *Folly Cornishe (Pvt) Ltd & Anor* v *Shingirayi Tapomwa N.O and 5 Ors* SC 26/14; *BT (Pvt) Ltd* v *Zimbabwe Revenue Authority* HH 617/14.

I next address the act or acts which the applicant relies upon as the nullity. As already alluded to, on 8 October, 2014, the second respondent was by order of NDEWERE J placed under provisional judicial management under case no. HC 8485/14. On 29 April, 2015, MATANDA-MOYO J issued an order under the same case no as follows:

> "It is ordered that –
> 1. The return date is hereby extended to 29 April, 2015.
> 2. The provisional order issued by this Honourable Court on 8 October, 2014 be and is hereby confirmed.
> 3. There be no order as to costs."

In relation to the third respondent which had been placed under provisional judicial management under case no. HC 10883/14 on 17 December, 2014, MAKONI J (as she then was) granted the following order on 11 March, 2015–

> "It is ordered that
> 1. The provisional order issued by this Honourable Court on 17 December, 2014 be and is hereby confirmed.
> 2. There be no order as to costs."

The applicant took the point that MATANDA MOYO'S order in HC 8485/14 simply extended the provisional order of judicial management to the same date to which she granted the extension, which was to 29 April, 2015. The learned judge then confirmed the extended provisional judicial management order. The applicant argued that there was no provision under the Companies Act [*Chapter 24:03*] for confirmation of a provisional order. Reliance was placed on the provisions of s 305 of the Companies Act. I am in agreement that there is no procedure for the confirmation of a provisional judicial management order. The prime purpose of appointing a provisional judicial manager is to allow for such provisional judicial manager to take charge of the company and make initial investigations on the likely viability prospects of the company if it were to be spared from being wound up. The provisional judicial manager has 60 days from the date of his or her appointment to make preliminary findings as aforesaid. The period of 60 days can be extended by the court. The provisional judicial management order has a return date. On the return date, the court must act in terms of the provisions of s 305 of the Companies Act.

It must be noted that the provisions of s 301 of the Companies Act, are peremptory and speak to the contents of what a provisional judicial management order "shall" contain. Section 302 vests the custody of the property of the company in the Master of this court until a provisional judicial manager is appointed. Section 303 lists the duties of the provisional judicial manager once appointed. Essentially, the provisional judicial manager takes charge of the management of the company and the company assets. The provisional judicial manager must prepare a status report of the affairs of the company which report should then be laid before creditors, shareholders and where applicable, debenture holders of the company. The minute details of what the status report must cover are set out in paragraphs (i) and (vi) of subsection C of s 303. It is not necessary to list them individually. The report is then interrogated by the interested parties as mentioned herein as mandated by s 302 (1) (b) (ii) of the Companies Act. The meeting's resolutions and views of the stakeholders as aforesaid must then be placed before the court on the return date. The meeting will also nominate and propose a final judicial manager to be appointed by the Master in the event that the court resolves to give the company a life line to continue under judicial management for a possible resuscitation or emergence from the woods.

The return date of the provisional judicial management order is a key day for the company's fate. It is on this day that the court will make an informed decision on the future of the company. The decision which the court may make will be informed by the facts and

information set out in s 305 (1) of the Company's Act. It is convenient to quote *ex tenso* the provisions of s 305. They read as follows:

> "**Return day of provisional judicial management order**
> (1) On the return day fixed in the provisional judicial management order, or on the day to which the court or a judge may have extended it, the court, after considering –
> a) The opinion and wishes of the creditors and members of the company; and
> *b)* The report of the provisional judicial manager prepared in terms of section *three hundred and three; and*
> c) The number of creditors who did not prove claims at the first meeting of creditors and the amounts and nature of their claims; and
> d) The report of the Master; and
> e) The report of the Registrar;
> May grant a final judicial management order if it appears to the court that there is a reasonable probability that the company concerned, if placed under judicial management, will be enabled to become a successful concern and that it is just and equitable to grant such an order, or it may discharge the provisional judicial management order or make any other order that it thinks just.
> (2) A final judicial management order shall contain –
> a) Directions for the vesting of the management of the company, subject to the supervision of the court, in the final judicial manager, the handing over of all matters and the accounting by the provisional judicial manager to the final judicial manager and the discharge of the provisional judicial manager, where necessary; and
> b) Such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the final judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the court may consider necessary.
> (3) The court may at any time and in any manner vary the terms of a final judicial management order on the application of the Master, the final judicial manager or a representative acting on behalf of the general body of creditors of the company concerned by virtue of a resolution passed by a majority in value and number of such creditors at a meeting of those creditors."

To simplify or unpack the process, upon the grant of the provisional judicial management order, the court does so on scanty information save that it must be shown that the company cannot pay its debts and is otherwise therefore *prima facie* broke or financially unsound. On the return date the provisional judicial manager will have information to place before the court to consider whether to grant a final judicial management order. If on consideration of that information, the court considers that if judicially managed, the company can come out of the doldrums and become a successful concern, the court will grant the final judicial management order. If not so satisfied, the court will discharge the provisional judicial management order. The court can also make any other order it thinks just as the justice of the case may dictate.

The provisions of subsection 2 of s 305 are equally important and are peremptory. They authorize the matters which the court should consider and include in the final judicial management order. In practice counsel will prepare a draft of the final judicial management

order which encompasses the matters outlined in subsection 2. The court will then grant the final judicial management order in the proposed terms or as varied. In a manner of speaking, a final judicial management order is an example of a judicial takeover of the affairs and management of a company and vesting the same in a final judicial manager who in the exercise of his functions will carry out the duties set out in s 306 of the companies Act.

It must follow from the above expose of provisional judicial management orders and final judicial management orders that the two processes albeit related, are distinct in their aims and in substance. The former allows for an initial investigation of a company to enable the court to make an informed decision whether or not to grant a final order of judicial management or discharge the provisional order. If the order is discharged, then the company must be wound up or liquidated so to speak. A provisional judicial management order may be extended beyond its return date. It cannot however be subject of an order of confirmation as to do so is really senseless and illogical since the effect would be that there is being sanctioned a perpetual investigation of the company in perpetuity. The confirmation of a provisional management order is therefore a misnomer. It follows therefore that the confirmation of the provisional orders made in case No. HC 8485/14 and HC 10883/14 was a *non sequitur*. The orders were given in error resulting from a misreading or misunderstanding of the provisions of the Companies Act relating to provisional and final judicial management orders.

This brings me to the applicant's argument that the orders are invalid and must be declared to be so. On the authority of *Macfoy's* case (*supra*) it was argued that a nullity begets a nullity and does not result in an acquisition of rights or their extinction. The position obtaining before the invalid act must be taken as unaltered. The facts of the *Macfoy* case were simple. A statement of claim was delivered during vacation of the court when the rules of court forbade such delivery. LORD DENNING decided that the purported delivery in breach of the rules was not voidable but void and that a void act was a nullity which was as good as not having been done. *Macfoy's* case did not deal with or relate to wrongly decided court orders.

In terms of r 449 (1), of the High Court Civil Rules 1971, the court has limited powers as an exception to the *functus officio* doctrine to revisit its orders and judgment *mero motu* or on the application of any party affected and to correct, rescind or vary "any" judgment or order "that was erroneously sought or erroneously granted in the absence of any party affected thereby." In *casu*, the second and third respondents have submitted that the applicant ought to have utilized the provisions of r 449 and sought a correction, rescission or variation of the

confirmation orders as opposed to seeking a declaration of invalidity of consequential process which followed upon the grant of the impugned court orders.

The applicant put up strenuous arguments in its supplementary heads of argument that r 449 (1) was not applicable because the court orders were void. I do not propose to get bogged down in the interesting arguments by the applicant, one being that r 449 applies where the orders granted relate to what a court is otherwise authorized to or can completely grant. I disagree with the assertion. Such a construction would breed and promote anarchy if orders of a court were to be considered a nullity by a party and disregarded on the basis that nothing sits on a nullity unless the court has stated so. I have already determined that *Macfoy's* case cannot hold good in regard to court orders. A court order creates a presumption of validity and a right *in rem* which holds against the world at large. From a constitutional imperative, s 164 (3) of the constitution provides as follows:

> "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."

The key is that once it is established that what is at play is "an order or decision of a court, then it must be obeyed without qualification that it is right or wrong. If a party to whom the order relates does not wish to be bound by the order or decision, then such party must use lawful process to be excused from complying with the order like filing an appeal or seeking a respite or stay of compliance with the order. To leave the process to parties to disobey court orders because the parties consider them to be a nullity creates a parallel court system in terms of which judicial decisions are made and implemented by individuals other than courts, a sure recipe for disaster. The law giver by creating a judicial court hierarchy recognized the human nature of judges and other judicial officers. They are not infallible and can err. The appeal and review procedures are intended as corrective tools where errors have been made. A party who considers an order or decision of the court to be a nullity must follow the laid down procedures and have the court declare the perceived nullity to be so.

In the South African Constitutional court case, *Department of Transport* v *Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) the court held that invalid court orders are binding and can ground contempt of court if they are ignored. The Honourable KHAMPEPE J stated in the above case as follows at para 180:

> "The general rule is that orders that do not concern constitutional invalidity do have force from the moment they are issued. And in the light of s 164 (5) of the constitution, the order is binding irrespective of whether or not it is valid until set aside. "

It must be noted that s 165 (5) of the South African Constitution is worded similarly to s 164 (3) of the Zimbabwe Constitution. In para 182 the learned judge stated inter alia,

> "... like administrators, judges are capable of serious error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences."

The learned judge continued in para 183

> "...Allowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the constitution and the rule of law is built."

Lastly the learned judge stated in para 186:

> "...the legal consequence that flows from non- compliance with a court order is contempt. The essence of contempt lies in violating the dignity, repute or authority of the court... That the underlying order may have been invalid does not erase the injury. Therefore, while a court may, in the correct circumstances find an underlying court order null and void and set it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an order is invalid does not prevent the court from redressing the injury wrought by disobeying that order and determining future litigants from doing the same by holding the disobedient party in contempt."

It follows upon my acceptance of the correctness of the position set out in South African case I have cited above as applicable in this jurisdiction too, that contrary to the applicant's submission in para 13 of its heads of argument, every court order is in fact extant until set aside by a competent court. Counsel erroneously set out the law as follows in para 13

> "It is submitted that the provisions of r 449 cannot apply in circumstances where a court has no power to grant an order which statute has not specifically empowered it to grant. Rule 449 applies to orders which the court is otherwise empowered to grant such as for instance orders directing a defendant to pay a sum of money to a plaintiff. It does not apply to orders which are a legal nullity by reason of the fact that the court is not empowered to grant such orders."

The correct position is to the contrary. Even where a party to which an order relates thinks or holds even correctly that the order is invalid or a nullity, such order remains a court order characteristically and in substance until set aside. Thus, whilst the applicant's counsel is also correct to argue in the heads of arguments that judicial management as a remedy is a creature of statute and that the orders which a court may grant are to be found in the statute, viz, the Companies Act, the derivative source of the court's power does not affect the extant nature of the perceived wrong order until it is set aside by the court.

In *casu*, the court erred in granting invalid orders wherein provisional orders purported to be confirmed when the Companies Act does not provide for such an order. The orders were granted in the absence of the applicant. The applicant is affected by the orders. The respondents are correct to take issue and aver that the applicant needed to invoke the provisions of r 449

and sought the rescission of the orders given by MATANDA-MOYO J and MAKONI J (as she then was) respectively. I must therefore hold as the first, second and third respondents have contended that, to grant the relief of declaraturs that the provisional judicial management orders lapsed and that the appointment of first respondent as final judicial manager was incompetent by reasons of the invalidity or nullity of the court orders, would be to overturn extant judgments of other judges of this court unprocedurally. The correct procedure which should be adopted by a party who is affected by an order granted in such party's default is by way of applying for rescission or the setting aside of the order. Upon setting aside the order or decision, the court then gives directives as to the further management of the case. Invariably, the court upon the grant of rescission will grant the affected party leave to defend the case on such terms as the court may appropriately determine. It is within the realms of the affected party's defence to impugn the legality of the relief sought by the applicant. In other words, were rescission to be granted, then the applicant can challenge the legality of the applications to which the confirmatory orders given as detailed herein relate. The orders were the *causa sine qua non* of the appointment of the final judicial manager by the fourth respondent. The court orders which resulted in the trail of event s leading to the appointment of the first respondent as final judicial manager are extant and have not been rescinded. The relief sought in paragraphs 1 and 2 of the draft is denied.

The other determination which remains to be made pertains to confirmation of the cancellation of the lease agreement between the applicant and respondent, an order of eviction and consequential damages. I have already expressed the courts disapproval of the conduct of the first respondent in allowing the retention and continued occupation by the second respondent of applicant's property without a lease agreement, without paying rentals accrued and being accrued and not protecting the interests of the second and third respondents in continued debt accumulation and the interests of the applicant as a creditor of the second respondent.

The first, second and third respondents seek to avoid the relief sought by the applicant on no other basis than that the applicant did not first obtain leave to sue them. Although at law they are correct I find this position to be *mala fide* because the respondents are simply vexing the applicant. The defence amounts to a plea in t*errorum* to exacerbate an illegal occupation of applicants' property. The respondents are wrong to assume that once there has been decreed an order for provisional judicial management, then the company placed under such provisional judicial management enjoys unqualified protection from being sued to meet its obligations.

Judicial management is a vehicle which should not be used to oppress creditors but to protect them. The provisions of s 301 (1) of the Companies Act give the court a discretion to give directions staying legal proceedings save with the leave of the court. The provisional judicial manager in any event and by law exercises his or her powers subject to the supervision of this court. In the order of NDEWERE J dated 8 October, 2014 granted in case No. HC 8485/14, the learned judge made it clear in para (b) of the order that the judicial manager would perform his duties "subject to the supervision of this court". The judicial manager cannot go on a frolic of his own in managing the company. He is subject to supervision. In para (f) of the learned judge's order, it is stated that – "All actions, applications and proceedings and the execution of all writs, summons and other proceedings against the company shall be stayed and not proceeded with without the leave of his court being first heard (*sic*) and obtained."

A closer look at para 2 (c) of the order reveals that para(s) (a) to (c) of para 1 were to apply "*mutatis mutandis* in relation to the company and the judicial manager as if the company has been finally placed under judicial management." The judicial manager was therefore granted powers to exercise the powers of a final judicial manager *mutatis mutandis*. One of the duties of the final judicial manager as given in s 304 (b) of the Companies Act, is, "to manage the company, subject to any order of the court, in such manner as he may consider most economic and most likely to promote the interests of the members and creditors of the company …". It cannot be said that the first respondent has acted in the interests of the applicant as a creditor in having the second respondent remain in occupation of the premises of the applicant without paying rent and enlarging the company's debt portfolio.

The respondents have referred to the case of *Lesotho Bank* v *Lesotho Hotels International (Pty) In Judicial Management* CIV/APN/220/93 to advance the argument that it would be preferable not to evict the respondents without the leave of the court since the process of salvaging the company requires that the second defendant be housed. Counsel submitted that the Lesotho approach was preferable to the approach adopted by ZHOU J in *ZFC Ltd* v *K M Financial Solutions (Pvt) Ltd* HH 47/15. ZHOU J reasoned that the purport of an order of stay of proceedings upon the grant of an order for provisional judicial management could not extend to actions which had not been commenced. In my view this approach makes jurisprudential sense and must be preferred. The judicial manager would be in charge. There is no logic in staying an unknown or every future action. The stay must be limited to that which is in existence. Even if I am wrong in my reasoning, I reason that since the stay is in the discretion of the court, a failure to first obtain leave does not invalidate the claim. The court must still

retain a discretion whether or not to entertain the case brought before it without leave having first been obtained. The purpose of the temporary protection given to the company is to avoid subjecting the company to a multiplicity of litigations which may be expensive, time consuming and unnecessary as may divert the provisional liquidator's attention from focussing on the company's salvage. Therefore, the nature of a claim will be a key consideration amongst others when the court considers whether or not to condone the proceedings instituted without leave. The grant of leave and the grant of a stay are not statutory imperatives wherein the court's hands are tied. The court should be guided by the interests of justice and that means interests of all stake holders.

I must consider that part of the claim being made, namely eviction of the second respondent and all claimants through it is not subject to proof of debt. To refuse to grant such a claim in circumstances where it is not disputed that the lease agreement expired and no rental payments are being remitted to the applicant would amount to a gross injustice. To impose a tenant who does not pay rent upon another's property has no legal justification and would violate property rights in violation of s 72 (2) of the Constitution. If the lease expired, then it is not for the court unless it has taken leave of its senses to create a tenancy contract between the parties where there is no agreement between the parties. I therefore hold that what must inform my decision is firstly note that the firs respondent did not protest the non-payment of rental by second respondent and expiration of the lease agreement. He at best said that the amount of debt would be subject to verification. In such a case the justice of the case will be met by granting the claim for eviction and deferring the claim for unpaid rentals to the judicial manager to consider the claim as part of proof of debt as with other creditors.

Accordingly, I make the following order by reference to the draft order and in the process will grant the application 50% of its opstsa as its claim has succeeded in part only.:

1. Claim 1 for a *declaratur* that the provisional judicial management orders dated 8 October and 17 December, 2014 placing 2nd and 3rd respondents under judicial management have lapsed is dismissed.
2. Claim 2 for a *declaratur* that the appointment of the 1st respondent as final judicial manager for 2nd and 3rd respondents be set aside, is hereby dismissed.
3. Claim 3 for confirmation of the cancellation of the lease agreement between the applicant and 2nd respondent is granted.
4. Claims 4 and 5 for the eviction of the 2nd respondent and everyone else claiming any right of occupation through the 2nd respondent from 87 Plymouth Road,

Southerton Harare is granted and the Sheriff is authorised to remove the 2nd respondent and its belongings therefrom and give possession of the property to the applicant if the 2nd respondent shall not have given the applicant vacant possession within 48 hours of service of this order.

5. Claims for arrear rentals, holding over damages, interest and ancillary costs are to be determined, and paid if proved, as part of the judicial management process in terms of the Companies Act.
6. Claims for a declaration that the assets of the 2nd were unlawfully transferred to the 3rd respondent and ancillary relief are matters for reference to the judicial manager to be dealt with by him in the first instance and the court refrains from making an order thereon.
7. The 2nd respondent is ordered to pay 50% of the applicant's costs and such costs whether agreed or taxed shall be factored by the 1st respondent as a charge on the costs of judicial management.

Wintertons, applicants' legal practitioners
Mbidzo Muchadehama & Makoni, 1st, 2nd & 3rd respondents' legal practitioners