ZIMBABWE DIAMOND AND ALLIED MINERALS MINES WORKERS UNION
And
SYLVESTER BEREMAURO
And
MICHAEL PHIRI
versus
ZIMBABWE GERMAN GRAPHITE MINES (PRIVATE) LIMITED T/A LYNX MINE
And
THE MASTER OF THE HIGH COURT
And
THE REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 10 November 2020 & 17 February 2021

Opposed Application – Corporate rescue

Mr R J Gumbo with Mr O Kadare &Mr W T Chinembiri, for applicant
Mr J R Tsivama, for respondent

CHAREWA J: Applicants seek for the placement of the first respondent under corporate rescue in terms of s121 (a) (i) (ii) (iii) of the Insolvency Act (Chapter 6:07) as read with s124 and 131, on the grounds that it is financially distressed, it having failed to pay accounts in terms of its obligations, and that justice and equity requires that first respondent be resuscitated or rescued given that there are reasonable prospects for such rescue.

First respondent opposes the application on the basis that it is not in financial distress, it having paid off all its creditors, and its board is now in the process of looking for appropriate means and ways to resuscitate the company.

In limine.

First respondent raised two preliminary issues which I dismissed out of hand and advised that my reasons will be handed down with my reasons for judgment on the merits. I directed the parties to argue on the merits. The reasons for dismissal of the preliminary points follow.

The first preliminary point is that in terms of s124 of the Insolvency Act, the applicant ought to have notified all parties in a standard notice of its intention to file this application,

failure of which makes this application improper. In my view the publication of the notice satisfied the requirements of the law in accordance with the principles enunciated in *Shatirwa v Associated Mineworkers Union* HH120/20. The point *in limine* is thus one of those meaningless points *in limine* which legal practitioners raise wantonly and unnecessarily and need not detain the court.

The second point *in limine* is one of substance and on the merits: that first respondent is not financially distressed because it has paid off all its creditors. I also dismiss this purported point without further ado.

There are other procedural challenges with respect to the notice of opposition by the first respondent which I have opted to overlook so that I substantively resolve this matter, given that corporate rescue applications, by their very nature, are proceedings which must be resolved expeditiously given that they affect employees, creditors and the very existence of a company as a going concern.[1] These challenges are sufficiently and soundly addressed in the applicant's heads of argument and I subscribe to the applicant's position thereon.

Background

First respondent, a private limited liability company in terms of the laws of Zimbabwe, has two shareholders: the Zimbabwe Mining Development Corporation and Graphitwerk Kropfmuehl A G of Germany (the German shareholder). It owns a mining block of graphite with lithium and gold by-products at Farm number 138 Vuti, Karoi, Hurungwe District, Mashonaland West Province, since 1965. This is the only graphite mine in Zimbabwe. And, apart from Madagascar and a soon to be commissioned operation in Mozambique, it is the sole graphite producer in Africa.

Up until 2008, with the advent of indigenization, the first respondent's operations were run meticulously by the German shareholder. Thereafter management disputes between the shareholders began to manifest such that the German shareholder abandoned the operation. This resulted in no meaningful feasibility studies on the resource audit, metallurgical float shade, marketing to determine future capital expenditure, operating capital and projected cash flows. This was compounded by gross undercapitalisation, financial distress and collapse of governance structures. Consequently, first respondent suffered financial losses every year from

[1] See *Koen & Anor v Wedgewood Village Golf & Country Estate (Pvt) Ltd & Ors* 2012 (2) SA 378 (WCC)

2013 to 2016 such that it ceased operating in November 2016. It failed to pay salaries and wages despite court orders and workers were sent on unpaid leave.

The business plans of first respondent were taken away by management who continue to run the company on a care and maintenance basis, in circumstances where there are opaque and suspicions practices of self-aggrandisement through small scale mining, thus committing an act of insolvency.

In 2017, the chairperson of first respondent's board was reported in mainstream media to suggest that an injection of US$5 000 000 should get the mine back to viability.[2] The market for lithium and graphite is one of the world growth areas in view of the global industrial move towards electric vehicles. With estimated reserves of over 12 years, the company is ripe for corporate resuscitation by injection of capital and sound management.

This background is not seriously disputed or challenged, save for the fact that first respondent did manage to pay some workers' dues, but not from its own resources.

Requirements for corporate rescue

The law requires that for a company to be placed under corporate rescue the following must exists:

1. The company must be financially distressed in that it must have failed to pay any account in terms of an obligation, public regulation or contract;
2. It is just and equitable that a company be placed under rescue to facilitate the rehabilitation of the company by providing for temporary supervision of the company; its protection by a moratorium on the rights of claimants and the development and implementation of a plan to restructure its affairs to ensure its continued existence.
3. There are reasonable prospects of rescue that results in a better return for the company's creditors and shareholders than would result from liquidation.[3]

Is first respondent in financial distress?

Financial distress is the inability to pay obligations as they fall due, with a possibility that a company will not be able to pay its obligations within the next six months.[4] It is not in dispute that first respondent's employees had to approach the labour court over unpaid salaries

[2] Sunday Mail, 1 October 2017
[3] See s121(1) Insolvency Act, Chapter 6:07.
[4] See S121(i)(f)

and obtained judgment in their favour. In fact, the record shows that first respondent was so financially distressed that it sought exemption from salary increases.

At the same time, the first respondent had failed to discharge its statutory obligations to National Social Security Authority (NSSA), Zimbabwe Development Fund (ZIMDEF), Zimbabwe Revenue Authority (ZIMRA), Mining Industry Pension Fund (MIPF) and the National Employment Council for the Mining Industry (NEC), among other creditors.

Clearly, despite protestations to the contrary, first respondent is in financial distress, more particularly when note is taken that those debts that it has paid, were not paid from its own funds but from resources of sister companies. For instance, the debt to employees of $226 835, 46 was paid from the shareholder's account, in July 2019, fully 6 months after the deadline given by the court. And a payment of $1 345 864.95 was made from the account of Sandawana Mines (Pvt) Ltd on 25 June 2020.

Nor is it seriously in dispute that various other creditors had sued first respondent over unpaid dues, resulting in attachment of first respondent's various assets. As at 15 February 2018, first respondent, in a letter to the NEC, and through its mine manager, admitted to a debt of around $2 million. Further proof of financial distress is the admitted fact that since November 2016, first respondent has been moribund, hence the professed intention, as at February 2018, to seek a technical or financial partner to help re-open and sustain operations.

To argue, in the circumstances that first respondent is not financially distressed is quite strange, when, on its own, or through its Zimbabwean shareholder, it has no resources to resume operations, nor the capacity to recapitalize, let alone have the technical equipment and expertise to resume operations, or attract funding. This is even more so given that, as stated above, first respondent has had to rely on third parties to meet its obligations. In fact, first respondent does concede, in its opposing affidavit, that it has been in financial trouble for more than five years.

First respondent's counsel appears more concerned with technical arguments which do not resolve the issue: whether or not the company is financially distressed and requires corporate rescue. For instance, he went to town about the procedure for coming up with a corporate rescue plan in terms of s143, which in my view, is not the central issue in this application. Further, he was of the view that the court should consider the rescue plan itself at this stage, but that in my view, is to put the cart before the horse, and a misinterpretation of

Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & Another or *Naidoo v Michau.*[5]

The application before me requires that I make a decision whether first respondent is a company that is so financially distressed that it requires rescue, and if so, whether it is capable of being rescued, given its market potential, its capitalisation prospects, and a revamp of its management ethos, its human resource and technical base. Therefore all an applicant is required to do is to place before the court a factual foundation for the reasonable prospect of rescue. Once a rescue practitioner is appointed, it is his duty to put in place a rescue plan[6] acceptable to the shareholders and feasible of implementation. The court can only consider a rescue plan to the extent that it proves that a company is capable of rescue. It is not the function of a court to approve a rescue package/plan, as that would be to usurp the shareholders' responsibilities.

Such a factual basis for rescue has been placed before the court *in casu:* there is a judgment debt in favour of the workers, including a failure to pay employment related obligations; a letter seeking exemption to pay increased salaries; works council minutes showing a failure by first respondent to meet employment obligations, writs of execution by judgment creditors and nothing showing that such creditors have been paid from first respondent's resources; payments to workers from third parties; and an admission that first respondent has been in financial distress for more than five years and in fact stopped operating in 2016.

Is it just and equitable for the company to be placed under corporate rescue?

That four years have passed since the first respondent ceased operations in 2016, with no tangible change in its business fortunes clearly shows an inability or incapacity by its management to move the company forward. Clearly, apart from the February 2020 Five Year Business Plan, management has not come up with any growth strategies or reassessments of personnel, processes, technology and infrastructure to resume successful operations.

However, the value of this business plan is to support the averments by the applicant: that with a proper and efficient business management model, which leverages on the future demand for lithium and graphite, and the scarcity of the resource on the world market, first respondent is primed for exponential growth for at least the next two decades.

[5] 2013(1) SA 542 & Case No 269/2019.
[6] See s 121 as read with s142

Thus, given the economic benefit to the country, the room for employment growth, both at the mine and downstream industries, it cannot be gainsaid that it is just and equitable that all efforts should be made to rescue the first respondent. In order to avoid corporate rescue a company must

1. Show that creditors have been paid;
2. There must be two sets of balance sheets, one at the time that the application is received and the other at the time of hearing showing the improvement in the financial status of the company;
3. A rescue plan by the shareholder;
4. Current liabilities and income statements showing that the company does not require rescue and has demonstrable ability to meet future liabilities.[7]

All this is missing from the respondent's documents.

Are there reasonable prospects of rescue?

The preliminary report for graphite mining at page 175 of the record concludes that there are bright respects for reviving the company. Only the financial and human capital are missing, both aspects of which can be attended to by a corporate rescue practitioner. Even investors who are not subject to the prevailing sanctions regime can be found by a competent and committed professional rescue practitioner. First respondent's own five year business plan supports this conclusion.

What seems to be missing is the capacity and will within first respondent's management echelons to put in place an effective rescue plan. In the circumstances, an impartial, professional practitioner is the best option.

Consequently, I find that this is an application which fulfils the requirements of an application of this nature and ought to be granted.

Disposition

In the premises the application is granted in terms of the draft order filed of record.

Messrs Gumbo & Associates, applicant's legal practitioners
Messrs Sawyer & Mkushi, respondent's legal practitioners

[7] See *Shatirwa* (supra)