Judgment NO. HB 194/11
Case No. HC 2353/11
Xref No HC 781/11

ZIMBABWE TEXTILE WORKERS UNION **APPLICANT**

VERSUS

MERLIN (PRIVATE) LIMITED t/a MERSPIN **1ST RESPONDENT**

AND

ASSISTANT MASTER OF THE HIGH COURT OF ZIMBABWE **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 21 NOVEMBER 2011 AND 8 DECEMBER 2011

L. Nkomo for applicant
V Majoko for 1st respondent

Opposed matter

MATHONSI J: At the close of submissions by counsel in this matter, I granted the 1st respondent leave to file additional affidavits incorporating knew facts which arose after the opposing affidavit was filed. In particular, Mr *Majoko* for the first respondent had submitted that the management of the first respondent had unlocked funding in the region of US$800 000-00 which was to be injected into the business thereby making it unnecessary to introduce new management.

I directed that such supplementary affidavit be filed by close of business on 25 November 2011 and once so filed and served upon the applicant the latter should file its response thereof, if any, by close of business on 30 November 2011 after which I would determine the matter on the basis of submissions made and the extra documentation filed.

The first respondent has not filed any supplementary affidavit as directed and needless to say, the applicant has not filed any either. Instead, by letter to the Registrar dated 28 November 2011, the applicant's legal practitioners requested that I proceed to determine the

matter on the basis of the papers filed already and submissions made by both counsel. That is what I am proceeding to do.

That the first respondent is a troubled company in serious financial dire straits is self evident. It was suspended from the Zimbabwe Stock Exchange. It has not paid its employees at all since January 2010 when it employs about 200 employees. It has not engaged in any production since September 2010 and the factory from where it operates looms large but dormant.

The applicant is a duly registered trade union whose members are employed by the first respondent. The workers committee of the first respondent employees authorised the applicant to institute these proceedings on behalf of the employees. In addition to that, the applicant is a creditor owed by the first respondent, which has failed to pay union fees in terms of regulations governing that namely section 8(2) of Statutory Instrument 19/2002. A sum of US$35 757-00 is owed to the applicant in that regard.

In my view the objection made by Mr *Majoko* for the first respondent, to the applicant's *locus standi in judicio*, is baseless. The applicant clearly has authority to institute these proceedings.

In this application, the applicant seeks an order placing the first respondent under provisional judicial management. The applicant has advanced the argument that by reason of mismanagement the first respondent is unable to pay its debts as symbolised by its failure to pay its employees for almost two (2) years resulting in a wage bill which stood at US$891 903-01 as at August 2011. It has also failed to pay statutory dues as shown by the ballooning debt owed to the applicant which stood at US$35757-00 as at August 2011.

The applicant argues further that the first respondent, which is a textile manufacturing concern whose line is spinning, weaving, dying and making napkins, towels and juvets, has not embarked on any form of manufacturing since August 2010 even though the factory is fully equipped with machinery for the undertaking.

It is stated that the financial books of the enterprise have not been audited for a considerable period of time as management neglects its duties. Faced with these insurmountable financial problems the management of the first respondent has not even

retrenched employees and has not come up with any measures to harness the situation at all content to let the situation continue unabated.

In its opposing affidavit sworn to by its director, Danisa Nkomo, the first respondent admits most of the allegations levelled against it. On the issue of its inability to pay its debts and the failure to produce goods, it states at paragraph 6;

> "Per 7.2. first respondent admits owing its workers some salary arrears, but denies the amount alleged, averring instead that the aforesaid amount includes statutory payments due to statutory authorities, and for which the applicant has no *locus standi* to claim. Even so, the amount includes monies for days the workers were not at work.
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> Per 7:3 first respondent admits that it is not producing goods at the moment but denies that this is so in spite of machinery that (is) in good working order.
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> Per 7:5 first respondent admits that when it faced viability problems, as a result of frequent machine breakdowns and lack of spares, it sought to retrench applicant's members, they refused. The first respondent then sought to introduce a shorter working week, again the workers refused."

The first respondent denies that the problems of the company are attributable to poor management and claims that with financial backing, the company can be a successful concern.

It matters not that what the first respondent owes includes statutory deductions due to various statutory bodies. The first respondent remains owing both the wages due to employees and the deductions due to statutory bodies. It is unable to pay those debts.

While admitting its inability to engage in any form of production for well over a year, the first respondent attributes this to breakdowns in machinery. It has not been explained why the machines are breaking down and why they have not been repaired. It is unthinkable that since September 2010, management has been trying to source for spares.

Management would also want the court to believe that while retrenchment was a viable option, it has not been undertaken because the workers refused. There is nothing to suggest that management is aware of the procedure for retrenchment as they can still submit an application to the retrenchment board even without the co-operation of the workers.

Section 299(1) of the Companies Act [Chapter 24:03] provides:

"Subject to s300, the court may –

(a) on an application being made to it for such an order by any person who would be entitled to apply for the winding up of the company, grant a provisional judicial management order, or

(b) on an application being made to it for the winding up of the company, grant instead a provisional judicial management order."

Persons who may apply for a winding up order are set out in section 207 of the Act and they include "any creditor or creditors" of the company. Therefore the applicant in its capacity as a creditor and as a representative of employees, who are also creditors of the first respondent, is entitled to make an application for a provisional judicial management order.

The next issue to be determined is whether a good case has been made for the relief sought. Section 206 sets out the grounds upon which a company may be wound up and they include where it is unable to pay its debts. Section 300 of the Act sets out the requirements for a provisional judicial management order. It reads;

"The court may grant a provisional judicial management order in respect of a company –
(a) on an application referred to in paragraph (a) of subsection (1) of section 299, if it appears to the court –

(i) that by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and

(ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and

(iii) that it would be just and equitable to do so"

I have already alluded to the fact that the first respondent is a troubled enterprise which is unable to pay its debts. I have also made reference to the inexplicable conduct of its management to stand akimbo, doing virtually nothing about the ballooning wages bill, which continues to accumulate, from as far back as January 2010. Management has also not given any satisfactory explanation for its failure to retrench some of the employees or the failure to engage in any form of production for well over a year.

The story that production was halted by the breakdown of machinery and that spares are still being sourced 15 months later is simply disingenuous. Even after according management an opportunity to place before me further affidavits to address what exactly they

propose to do for the future of the company they failed to do so. The only reasonable conclusion to be made is that poor management has contributed to the problems of the company.

In any event, section 300 (a)(i) provides that a court may grant the order if it appears that "by reason of mismanagement or for any other cause" Even if I am wrong that mismanagement is to blame, I am of the view that this is a case where someone else should be given the stewardship of the enterprise to try and breathe in fresh ideas. Therein lies "any other cause" for granting the order.

The applicant has already approached Cecil Madondo of Tudor House Consultants (Pvt) Ltd who has agreed to take up the responsibility. The first respondent has not suggested that he is not a fit and proper person to assume the task. In fact, he has in the past acted in that capacity.

In conclusion, I am satisfied that a good case has been made for the relief sought. Accordingly I grant an order for provisional judicial management in terms of the draft order filed of record as amended.

James, Moyo-Majwabu and Nyoni, applicant's legal practitioners
Dube-Banda, Nzarayapenga and Partners respondent's legal practitioners