HH 516-23
HCHC 456/23
REF HCHC 82/23;HCHC 508/23;HCHC 520/23

DIMITROS DIVARIS
(In his capacity as Executor of the Estate Late Vassilliki Divaris)

Versus

TETRAD INVESTMENT BANK

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 19 July & 7 September 2023

Opposed application

L.Zinyengere for applicant
L.Mutasa for the respondents

BACKGROUND

[1] I furnish hereunder and on request, the reasons why the court struck this application from the roll on 19 July 2023.That order was preceded by reasons *ex tempore*.

[2] The dispute before the court hinges on a simple question. When do corporate rescue proceedings commence? And flowing from that, what is the effect of such commencement? Especially on the mandate and office of directors affected? And of course, one may then ask; - what is the position regarding institution of legal proceedings against the entity? I will return shortly to these issues

THE DISPUTE

[3] Applicant is the testamentary executor of the estate late Vassilliki Divaris. The late Divaris owned 454,890 shares in respondent bank (“Tetrad”). On 28 June 2023, Tetrad published a notice of an extraordinary general meeting (“EGM”). The EGM was scheduled to take place on 20 July 2023. Its purpose being to procure shareholder approval to change the nature of the company`s business. Tetrad`s directors had resolved to surrender the bank`s licence and set sights on venturing into property and real estate.

[4] Applicant was most alarmed by this development. To him, the purported transformation of Tetrad from a bank to a realtor, was unpalatably irrational. He approached this court on an urgent basis. He prayed for a prohibitory interdict staying the holding of the EGM. Applicant intended to put a stop to all that. In addition, application attacked the same directors on other allegations of corporate misconduct. And that was not all.

[5] Applicant also contended that the EGM improperly pre-empted the finalisation of case number HCHC 82/23.This being an application he had filed in this court on 3 February 2023 seeking the placement of Tetrad under corporate rescue. He had brought this application as an "affected person", in terms of section 124 (1) of the Insolvency Act. This application under HCHC 82-23 was, and still is pending finalisation.

[6] The present application was opposed. Mr. Andre Lourence Vermaak deposed to the opposing affidavit. He did so in the capacity of a director of Tetrad. It becomes unnecessary for present purposes, to wade into the arguments on the merits borne out in the papers. This matter stands to be resolved purely on the procedural issues. These being the requirements set out in Part XXIII of the Insolvency Act [Chapter 6:07].

WHEN DO CORPORATE RESCUE PROCEEDINGS COMMENCE?

[7] It is common cause that an application for placement of Tetrad under corporate rescue is pending before the court. Mr. *Zinyengere* for the applicant argued that corporate rescue proceedings commenced the instant that application was filed under HCHC 82/23. The consequences of corporate rescue proceedings automatically kicked in.

[8] One such consequence, argued counsel, was the suspension from office (and resultant cessation of function) of Tetrad`s directors. For that reason, the purported opposition to ythe present proceedings by Mr Vermaak, on behalf of Tetrad, was invalid. The deponent had no mandate to act in the capacity of director. There was therefore no opposition before the court.

[9] Mr. *Mutasa* for the respondent argued to the contrary. Corporate rescue proceedings did commence with the filing of an application by an affected person in terms of section 124 (1). It only started after an order to that effect was granted by the court. This approach was consistent with the wording of the Act. Section 124 carried the heading "*Court order to commence corporate rescue proceedings"***.**

[10] Further, counsel argued that section 124 (1) was clear. The affected person had to apply and procure an order positively stipulating the placement of an entity under rescue. Counsel stressed the underlined wording was in the Act. He argued that such phraseology was deliberate. Section 124 (1) provided that; -

> (1) Unless a company has adopted a resolution contemplated in section 122, an affected person may apply to a Court at any time <u>for an order</u> placing the company under supervision <u>and commencing corporate rescue proceedings</u>.

[11] The court receiving such application was enjoined, under section 124 (4) (a) to; -

> *a*) make an order placing the company under supervision <u>and commencing corporate rescue proceedings</u>.

[12] For that reason, section 125 of the Act was inconsistent within section 124. Mr. *Mutasa* therefore urged the court to find favour with section 124`s definition of when corporate rescue proceedings commenced. Counsel adhered to this position. He remained unpersuaded by the Supreme Court decision of *Metallon Gold Zimbabwe (Pvt) Ltd & 3 Ors v Shatira Investments (Pvt) Ltd & 3 Ors* SC 107-21 ("*Metallon Gold*"). This authority held that the filing of an application under section 124 (1) marked the start of corporate rescue proceedings.

ARE THERE INCONSISTENCIES IN THE INSOLVENCY ACT`S PROVISIONS ON COMMENCEMENT OF CORPORATE RESCUE PROCEEDINGS?

[13] My view is that the Act is not at all inconsistent on that point. Section 125 clearly stipulates when corporate rescue commences and ends. I say so for the following reasons. The Insolvency Act itself provides the first answer to that. And the leading Supreme Decision of *Metallon Gold* provides the second. I will start with the Insolvency Act.

[14] Section 125 deals with the duration (namely start and end) of corporate rescue proceedings. Section 125 (1) marks their commencement, whilst section 125 (2) prescribes their termination. Before proceeding, I set out the relevant provisions hereunder; -

> 125 Duration of corporate rescue proceedings
> (1) Corporate rescue proceedings *begin* when—
> (*a*) the company—
> (i) files a resolution to place itself under supervision in terms of section 12(3); or
> (ii) applies to the Court for consent to file a resolution in terms of section 122(5)
> (*b*);
> or
> (*b*) *an affected person applies to the Court for an order placing the company under supervision in terms of section 124(1);* or
> (*c*) a Court makes an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated in section 124(7).
> (2) Corporate rescue proceedings *end* when—
> (*a*) the Court—
> (i) sets aside the resolution or order that began those proceedings; or
> (ii) has converted the proceedings to liquidation proceedings; or
> (*b*) the practitioner has filed with the Master a notice of the termination of corporate rescue proceedings; or
> (*c*) a corporate rescue plan has been—
> (i) proposed and rejected in terms of Sub-Part D of this Part, and no affected person has acted to extend the proceedings in any manner contemplated in section 145; or

(ii) adopted in terms of Sub-Part D of this Part, and the practitioner has subsequently filed a notice of substantial implementation of that plan.

(3) If a company's corporate rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the Court, on application by the practitioner, may allow, the practitioner must—
(*a*) prepare a report on the progress of the corporate rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and
(*b*) deliver the report and each update by standard notice to each affected person, and to the—
(i) Court, if the proceedings have been the subject of a Court order; or
(ii) Master, in any other case.

[15] In my view the above section is remarkably clear. It defines, in the relevant subsections, when corporate rescue proceedings commence or end. In doing so, section 125 recognises that corporate rescue can be ushered in under different circumstances. Each start determines the end. And each commencement generates a different set of procedures, formalities and obligations.

[16] An application under section 124 (1) must be properly recognised for what it is. It is a prayer to the court that all is not well. That prayer is brought by an individual. Possibly one with little effect to the daily operations or decision making of the entity. The Act responds swiftly. Why it does so is fully addressed in *Metallon Gold*. I will soon advert to that authority. But the point is that one must not compare company-triggered rescue applications to those commenced by an individual. It makes great sense for corporate rescue proceedings to commence instantaneously in such event. The dictates of corporate rescue objectives may not await the outcome of a court application.

[17] Before moving on to *Metallon Gold*, I address Mr. *Mutasa*'s specific argument. Counsel moved the court to accept that sections 124 (1) and (4) clearly state that proceedings commence upon issuance of a court order. To consider that argument, we need not step

beyond the two most fundamental rules of statutory interpretation. These being (a) the ordinary meaning of the wording used and (b) the intention of the legislature.

[18] Section 124 (1) invests in an "affected person" the right to apply to court. It directs that person to the permissible remedy they must seek before the court. The applicant, in that regard, is trammelled by the relief prescribed. They cannot luxuriate in unlimited choice on and submit a wish list to the court. They must confine themselves to seeking "…*an order placing the company under supervision and commencing corporate rescue proceedings"*. This section defines the relief a party should seek. It does not prescribe the commencement or termination of proceedings.

[19] In filing its application in that regard, a party (and its adversary) must be guided by section 125 on when proceedings should start or commence. They must therefore frame the order, or craft their positions guided by that realisation. Namely that upon filing the application, corporate rescue proceedings will automatically commence. More importantly, the parties concerned must pay great heed to the narrow timelines affecting the application.

[20] If the applicant falters on those timelines, consequences ensue. That was the intention of the legislature. It also manifests in the various prescriptions and formalities ascribed to different modes of commencement of rescue proceedings. As regards the argument that section 124`s heading is self-explanatory, section 7 of the Interpretation Act [Chapter 1:01] is equally self-explanatory.

CORPORATE RESCUE PROCEEDINGS AS DEFINED IN *METALLON GOLD & 3 ORS v SHATIRA ENTERPRISES & 3 ORS*

[21] The term "corporate rescue proceedings "was considered in the Supreme Court decision of *Metallon Gold*. The following argument by counsel for the appellant in that matter found favour with the court [at page 7];

> "Mr *Girach* argued that the Legislature painstakingly laid down the procedures to be followed in corporate rescue proceedings as the process has dire consequences,

> in that the mere institution of proceedings initiates the process of corporate rescue." [underlined for emphasis].

[22] The underlined wording is instructive. the phrase "*corporate rescue proceedings*" denotes a process. It cannot be viewed as an event. For the very reason that it entails a series of activities and milestones designed to deliver the desired outcome. That outcome being the turnaround of the stricken business entity. Or as expressed in *Metallon Gold* [at page 13]; -

> "The purpose of corporate rescue is to avert the eventual failure of a company and to achieve the above objectives. The only acceptable outcome at the end is the survival of the financially distressed company."

[23] The Supreme Court, per MALABA CJ went to considerable length in unpacking the nature, purpose and particulars of corporate rescue. The court`s guidance in *Metallon Gold* is point, quite instructive. The *dicta* commenced with a historical commentary. It was observed that the nation had seen it fit to update the law and procedure of corporate rescue.

[24] Previously, the old Companies Act [Chapter 24:03] and its peer, the Insolvency Act [Chapter 6:04], regulated corporate rescue. But the entire concept had practically ground to a halt. And commerce was all the worse for it. The new Insolvency Act [Chapter 6: 07] introduced significant changes. The changes targeted noted inefficiencies in the process. In particular, it sought to cure the inability to address obvious mischiefs under the old framework.

[25] Continuing, the court in *Metallon Gold* articulated the new corporate rescue procedure. In doing so, MALABA CJ briefly opined on international best practice. The Learned Chief Justice then examined the authorities and principles behind corporate rescue. In the end, he asked the very same questions that now confront us herein. When do corporate rescue proceedings commence? And what is their effect?

[26] The court observed, as noted above, that corporate rescue commences in two main ways. As already commented above, each method triggered its own formalities.

Notwithstanding the clear guidance in *Metallon Gold*, Mr. *Mutasa* for the respondent argued a contrary position. He urged the court to distinguish that authority. And with considerable vehemence too. He submitted that corporate rescue proceedings commenced, not when an application was filed, but when an order was granted. I drew neither comfort nor conviction from counsel`s argument. He proffered no supportive authority for his position.

[28] As noted above, the statute is clear. Corporate rescue must be considered a process and not event. That process commences upon the filing of an application. That was the observation by appellant`s counsel in *Metallon Gold.* The legislature was quite deliberate in its wording of section 125. The reason for such was explained, to a great extent, by MALABA CJ in the same matter. The troubled entity must be preserved at earliest opportunity. That being done in order to accord the rescue practitioner the best possible chances of turning the entity round.

[29] A delay between the filing of an application, and its disposal is almost inevitable. In fact, the Insolvency Act strictures corporate rescue proceedings into tight timelines. The Supreme Court also spoke on the point. I find no cause to stray from its guidance. This court has been both clear and firm on judicial precedent. MATHONSI J (as he then was) adhered to such tradition and held in *Ncube v CBZ* HB 99-11, that [see page 4 of the unreported version];

> "As this issue has been settled by the Supreme Court in a number of cases, I find myself in total agreement with the words of NDOU J in *Sai Enterprises (Pvt) Ltd v Girdle Enterprises (Pvt) Ltd t/a Quality Engineering Services (Pvt) Ltd* HB 62/09 (as yet unreported) at page 2 where he said:
>
> *"This court is bound by the precedents set by the Supreme Court. Arguing against such clear decisions of the Supreme Court is province of academics and not this court.""*

[30] I am satisfied that corporate rescue proceedings for Tetrad commenced on 3 February 2023 upon the filing of HCHC 82-23. This takes us to the residual issues on effect of rescue proceedings.

EFFECT OF RESCUE PROCEEDINGS ON (i) LEGAL PROCEEDINGS AND (ii) STATUS OF TETRAD`S DIRECTORS.

[31] On legal proceedings, it was held as follows in *Metallon Gold* [page 15]; -

> "The effect of corporate rescue is to impose a general moratorium on commencing or continuing with legal proceedings, including enforcement of actions, against the company or in relation to any property owned by the company or lawfully in its possession, in any forum, for the duration of the corporate rescue proceedings. The moratorium, in terms of s 126(1) of the Insolvency Act, is automatic and comes into effect on commencement of corporate rescue."

The wording in the Act itself goes thus; -

> 126 General moratorium on legal proceedings against company
>
> (1) During corporate rescue proceedings, *no legal proceeding,* ***including*** enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, *may be commenced or proceeded with in any forum, except—*
>
> (*a*) with the written consent of the practitioner; or
>
> (*b*) with the leave of the Court and in accordance with any terms the Court considers suitable; or
>
> (*c*) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the corporate rescue proceedings began; or
>
> (*d*) criminal proceedings against the company or any of its directors or officers; or
>
> (*e*) proceedings concerning any property or right over which the company exercises the powers of a trustee; or

> (*f*) proceedings by a regulatory authority in the execution of its duties after written notification to the corporate rescue practitioner. [italicised for emphasis].

[32] This provision is similarly clear. No legal proceedings may be instituted or sustained against an entity under rescue. This is an old, established rule. But that bar is not absolute. The conditions (a) to (f) offer exceptions to those who might feel compelled to litigate against under-rescue entities. There lay my question to Mr. *Zinyengere*. Had applicant fulfilled the requirements under the exceptions prior to launching the present proceedings? Counsel eventually (and properly) conceded that no prior leave had been procured.

[33] That position provided answer to the main question. It was dispositive of the matter. It became unnecessary, in my view to deal with the status of Tetrad`s directors. Mr. *Zinyengere* had impugned the authority of Mr. Vermaak as a director or Tetrad. Mr. *Mutasa* countered with the argument already set out in the preceding paragraphs. He argued that the automatic suspension of directors upon the mere filing of an application under section 124 (1) created an absurdity.

[34] The company would be instantly plunged into a legal and administrative vacuum. That could not have been the intention of the legislature? What was supposed to happen, asked counsel for respondent, between commencement and appointment of the rescue practitioner, to the day-to-day affairs of the company? The quick answer to this question might lie in the provisions of the Act. They strictly regulate the entire process. But that is only a preliminary observation. I firmly sidestep this point for now. I was not satisfied with the attention paid to it by both counsel, with respect. It is a critical matter which requires robust examination beyond enthused argument.

DISPOSITION

[35] Before disposing of this matter, I dwell but briefly on the issue of costs. Each side`s papers, heads of argument and submissions, contained with respect, avoidable missteps. I am inclined to let each party carry its own obligation on costs. I do not have a proper application before me. What stands before me (and to borrow the observation in *Chiwenga v Mubaiwa*

SC 86-20) is a matter burdened by "*misapprehensions of the law*". It will be struck off the roll.

It is therefore ordered; -

That the application be and is hereby struck off the roll with each party bearing their own costs.

Zinyengere and Rupapa-applicant`s legal practitioners
Gill, Godlonton and Gerrans-respondent`s legal partitioners

CHILIMBE J____ [7/9/23]