

REPORTABLE (104)

- (1) METALLON GOLD ZIMBABWE (PRIVATE) LIMITED
- (2) GOLDFIELDS OF SHAMVA (PRIVATE) LIMITED
- (3) GOLDFIELDS OF MAZOWE (PRIVATE) LIMITED
- (4) MAZOWE MINING COMPANY (PRIVATE) LIMITED

v

- (1) SHATIRWA INVESTMENTS (PRIVATE) LIMITED
- (2) ASSOCIATED MINE WORKERS UNION OF ZIMBABWE
- (3) MASTER OF THE HIGH COURT
- (4) REGISTRAR OF COMPANIES

**SUPREME COURT OF ZIMBABWE
MALABA CJ, BHUNU JA & CHIWESHE AJA
HARARE, 23 MARCH & 07 OCTOBER, 2021**

F Girach, for the appellants

T Magwaliba, for the second respondent

No appearance for the first, third and fourth respondents

MALABA CJ: This is an appeal against the decision of the High Court (“the court *a quo*”) which placed the first, the second and the third appellants under corporate rescue

proceedings in terms of s 124(1)(a) of the Insolvency Act [*Chapter 6:07*] (“the Insolvency Act”). The judgment of the High Court dealt with two separate applications, numbers HC 2619/19 and HC 2696/19, which were consolidated for the purposes of hearing them.

The Court holds that the respondents did not comply with the mandatory provisions of s 124 of the Insolvency Act, which required them to notify each affected party of the application by standard notice. The respondents failed to notify each affected party by “standard notice”, as is prescribed by s 2 of the Insolvency Act. Such non-compliance with peremptory provisions of the Insolvency Act rendered the application for corporate rescue fatally defective.

This Court finds that the second respondent, being the only respondent before this Court, had no *locus standi* to make the application for corporate rescue as it does not meet the definition of “affected person” in terms of s 120 of the Insolvency Act. The second respondent is a registered trade union representing employees in the mining industry and not a registered trade union representing employees of the company as envisaged by s 120 as read with s 124 of the Insolvency Act. Further, the second respondent fails to meet the criteria of a creditor, as the judgment it relied upon is not against the first appellant but against a different party.

It bears mentioning that the first respondent was in default at the hearing of the appeal as it realised it could not possibly defend the judgment of the court *a quo*.

FACTUAL BACKGROUND

The first respondent (being a creditor of the appellant companies) and the second respondent (being a registered trade union in the mining industry) sought an order in the court *a quo* that the appellants be placed under corporate rescue in terms of s 124(1) of the

Insolvency Act. They alleged that the appellants were failing to pay creditors and that it was very likely that the appellants would become insolvent within the immediately ensuing six months, making them worthy candidates for corporate rescue.

The first respondent, armed with an order against the appellants for US\$6 394 232 issued in case HC 6197/18, made the application for corporate rescue as an “affected person”, being a creditor of the appellants in terms of s 121(1)(a)(i) of the Insolvency Act. The second respondent, in making its application, averred that it was an “affected person”, in that it was a registered trade union in the industry. The second respondent further stated that it also derived its *locus standi* from its status as a creditor of the second and the fourth appellants. No judgment against the second and the fourth appellants was attached to the founding affidavit before the court *a quo* to support the claim of *locus standi*. It attached a copy of a judgment obtained against the first appellant but no claim was made against the first appellant in the court *a quo* on the basis of that judgment.

In defending the matter, the appellants raised a number of points *in limine*. In case HC 2619/19 the *locus standi* of the first respondent was disputed, on the basis that its creditor status was compromised as the parties had entered into agreements for the settlement of the debt. The first appellant further raised the point that the first respondent had failed to comply with the requirements of s 124(2)(b) of the Insolvency Act requiring an applicant for a corporate rescue order to notify each affected person of the application by standard notice.

At the hearing of the applications, the first appellant raised the preliminary objection that the first respondent did not serve the Master of the High Court and the Registrar of Deeds with the applications. The first appellant argued that the Master of the High Court had to be served with the applications as he was required to provide a report.

Pertaining to case HC 2696/19, the appellants raised the preliminary objection that the application was not served on the fourth appellant. They further argued that the second appellant was a non-existent entity, as it had changed its name from Gold-Fields of Shamva (Pvt) Ltd to Shamva Mining Company (Pvt) Ltd. The second respondent, however, filed a notice of withdrawal in relation to the second appellant. The appellants also raised the point that the second respondent did not comply with the peremptory statutory requirement to notify all “affected persons” as envisaged in s 124(2)(b) of the Insolvency Act.

Subsequent to the hearing of the consolidated applications, the appellants filed two applications in terms of r 235 of the High Court Rules, 1971, for leave to file a further affidavit. The appellants intended to file an affidavit conveying to the court that they had managed to raise \$39 129 459.03. The contention was that they were now in a position to settle their debts with their creditors and provide working capital to revive the operations of the mines.

The court *a quo* dismissed all the points *in limine* raised by the appellants. The court *a quo* found that s 124(2)(b) of the Insolvency Act did not provide for the manner or form of notification of “affected persons”. The court *a quo* found that the respondents had effected proper notice on the appellants by publication in a local newspaper. The court *a quo* held that such notification was sufficient compliance with the requirements of the statute in the absence of knowledge of all “affected persons”.

Regarding the issue of the failure to serve the Master of the High Court with the application, the court *a quo* relied on the principle that what is not denied is deemed to be accepted. Therefore, since the appellants did not raise the issue of non-service in their notice of opposition, they were deemed to have accepted that the Master of the High Court was duly notified.

In relation to the merits of the matter, the court *a quo* took into consideration the supporting affidavit filed by the appellants in terms of r 235. The court found that the said affidavit corroborated the case for corporate rescue, as the position taken in the additional affidavit contradicted the positions taken in the opposing affidavits.

The court expressed the view that in case HC 2619/19 the appellants admitted indebtedness to the first respondent but argued that they had entered into a settlement agreement, the consummation of which was being stalled by the delay in retrieving a mining lease. They further averred that they were not in financial distress so as to warrant corporate rescue as their assets exceeded liabilities. The finding was that no evidence was produced to support the averments.

The court also found that the appellants had not been open and candid with the court as they had not disclosed their production plans, projections, estimates and financial status. The finding was that it would be impossible for the court to project that the appellants' positions in both matters could reasonably be expected to change for the better within six months.

The court further found that the appellants did not present evidence to show that they were not financially distressed. They failed to place information before the court from which it could determine that in the ensuing six months the companies would be able to pay off their debts. The court also found that no revival plans were placed before it. Consequently, the court *a quo* granted the application for corporate rescue, setting out the corporate rescue practitioners to be engaged.

Aggrieved by the decision of the court *a quo*, the appellants noted the present appeal.

SUBMISSIONS BEFORE THE COURT

The appellants' submissions

Mr *Girach* for the appellants submitted that there is a very specific procedure to be followed when commencing corporate rescue proceedings. He argued that the respondents failed to comply with s 124(2)(b) of the Insolvency Act, which requires an applicant for corporate rescue to notify each “affected person” of the application by “standard notice”. He rightly stated that the court *a quo* erred in finding that neither the manner of notification nor the form or content of “standard notice” was defined in the Insolvency Act.

Mr *Girach* argued that the court *a quo* erred in applying a purposive interpretation of the statute, when the ordinary grammatical meaning of the words was clear and unambiguous. He further submitted that the respondents could not hide behind the assertion that they did not have information of all “affected persons” as they could have obtained such information from the appellants had they requested for it.

Mr *Girach* contended that an assessment of whether or not a company is in financial distress can only be effectively conducted when the creditors of the company are known. Thus, he queried how the respondents could determine that the appellants were in financial distress without having obtained information of their debts and creditors. He stated that the advertisement published by the respondents in a local paper could not possibly be deemed to have notified all “affected persons”, as it was beyond the reach of foreign creditors.

Mr *Girach* also submitted that the second respondent had no *locus standi* to institute an application for corporate rescue. He argued that, in terms of the Insolvency Act, only an “affected person” could institute such proceedings. He argued that the second respondent was not a registered trade union representing the employees of the appellants, as prescribed by s 121(1)(a)(ii) of the Insolvency Act. It was a registered trade union in the mining industry.

Mr *Girach* further argued that the second respondent could also not derive legal standing from the provisions of s 121(1)(a)(i) of the Insolvency Act, as it was not a creditor of the first appellant. He submitted that the court order from which the second respondent claimed to derive *locus standi* was not against the first appellant but another company known as Metallon Gold.

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.

The second respondent's submissions

Counsel for the second respondent, Mr *Magwaliba*, submitted that the appellants' preliminary objection *a quo* was not raised in respect of a particular creditor who was not notified. He said the objection was raised as a bald allegation on the invalidity of the service of notice. He argued that the respondents served notice on creditors and attached e-mails to that effect. It was through an abundance of caution that the respondents caused the further publication of the notice in the newspaper.

In respect to the issue of *locus standi*, Mr *Magwaliba* argued that the appellants failed to raise that issue before the court *a quo* in the opposing papers. He argued that the principle that what is not disputed is deemed to be admitted ought to be applied against the appellants. He further argued that in terms of s 29 of the Labour Act [*Chapter 28:01*], a trade union represents employees in an industry, whereas a workers' committee represents employees at the workplace. The contention was that the second respondent enjoyed legal standing to institute corporate rescue proceedings against the appellants in the court *a quo*.

THE LAW ON CORPORATE RESCUE

The current Insolvency Act was enacted in June 2018. The Act repealed the former Insolvency Act [Chapter 6:04] and some provisions of the former Companies Act [Chapter 24:03]. The purpose of the new Insolvency Act is to provide for the administration of insolvency and assigned estates and the consolidation of insolvency legislation. Critically, the Insolvency Act replaced judicial management as a business rescue strategy with corporate rescue proceedings.

In defining “judicial management”, the Court in *Feigenbaum and Anor v Germanis NO and Ors* 1998 (1) ZLR 286 (HC) at p 294 held that:

“Judicial management is an extraordinary procedure made available to a company by the court in special circumstances and for statutorily prescribed purposes: *Silverman v Doornhoek Mines Ltd* 1935 TPD 349. The procedure is only adopted when the court is satisfied, on the facts contained in the application, that there is a reasonable probability that if placed under judicial management, the company which is unable to pay its debts will be able to pay its debts in full, meet its obligations and become a successful concern: *Preston & Anor v Hivu Estates (Pvt) Ltd & Anor* HH-183-97 at pp 29-30.”

The definition was reinforced in *Cosmos Cellular (Pvt) Ltd v Posts & Telecommunications Corporation* 2004 (2) ZLR 176 (S) at p 182, wherein it was stated that:

“The object of judicial management is to obviate a company being placed in liquidation if there is some reasonable probability that, by proper management or by proper conservation of its resources, it may be able to surmount its difficulties and carry on.”

The court in *Oakdene Square Properties (Pty) Ltd and Ors v Farm Bothasfontein Kyalami (Pty) Ltd and Ors* 2012 (3) SA 273 at para 7 stated the following:

“Judicial management has been termed a ‘spectacular failure’, ‘an abject failure’. The main reason for its disuse was the high threshold of proof required (‘reasonable probability’ and not merely a possibility) for an order and the requirement that creditors’ claims were to be paid ‘in full’. Empirical studies indicated a success rate of between 15 percent and 20 percent. Judicial managers were appointed largely from practicing liquidators, many of whom lacked the mind-set of

saving the company, invariably resulting in its liquidation. Judicial management had a negative effect on the creditworthiness of the company, thereby undermining financial assistance from financial institutions to recapitalise the company. It does not trigger a *concursum creditorum* as in the case of liquidation.”

With the passage of time, judicial management, which had been in terms of s 300 of the former Companies Act, became outdated and failed to cater for the needs of the modern-day business environment. It had several unsatisfactory aspects that defeated the purposes of business rescue.

Corporate rescue, on the other hand, is seen as a measure which seeks to avoid the liquidation of a company in order to preserve it in a solvent state for the benefit of the company’s security holders and creditors including the company’s workers, as well as the society in which it exists. This approach is broader than the approach under judicial management, in that it seeks to cover the interests of all stakeholders who benefit from the existence of the entity concerned.

Restructuring of companies in financial distress is on the increase globally. In line with this trend, South Africa, in its new Companies Act, No. 71 of 2008, introduced business rescue to the South African business landscape. The South African procedure in commencing business rescue proceedings is very similar to the Zimbabwean procedure for corporate rescue. Companies that are financially distressed in South Africa now have an opportunity to reorganise and restructure. This has far-reaching effects on creditors, financial institutions, shareholders, employees and society at large.

This concept is also called corporate reengineering in North American terminology. In the United Kingdom, companies in financial distress are allowed to restructure their affairs under the Insolvency Act of 1986, which provides for two rescue procedures, namely an “Administration” and a “Company Voluntary Arrangement”. The Insolvency Act of 1986

was aimed at the rehabilitation and preservation of viable businesses, as well as offering the ailing company a better chance of survival by allowing it to undergo a reorganisation or an arrangement plan rather than facing liquidation or administrative receivership. The Zimbabwean corporate rescue model reflects the same philosophy.

This new approach looks at the broader social justice context and does not restrict itself to private corporate interest alone. Corporate rescue proceedings are a paradigm shift from judicial management. The streamlined procedures are key in having a successful and effective business rescue regime critical to economic growth and stability.

Judicial management, which was the law in existence before corporate rescue, was found to be unsatisfactory as a vehicle for business rescue for a number of reasons. The procedure was regarded as an extraordinary remedy, which infringed upon the rights of creditors and was only available under special and limited circumstances. The procedure was only available to companies incorporated in terms of the Companies Act and was not available to other forms of business entities such as partnerships, trusts and private business corporations.

In addition, the judicial management scheme was too formal and over-regulated, in that the procedure was rather costly, slow and cumbersome. The former Companies Act had some defects in the appointment and qualifications of judicial managers, for instance an applicant could nominate a person to be appointed as judicial manager. Judicial management failed to provide a mechanism for the management and reorganisation of companies with a view to returning them to profitability. In some instances, it resulted in company failures and their winding up, thus negatively impacting on the economy.

A concern for the livelihood and wellbeing of those dependent upon an enterprise which may well serve an entire town or region is a legitimate factor to which the modern law of insolvency needs to have regard. The chain reaction and consequences of liquidating a company could potentially be disastrous to creditors, employees and the community. These were some of the issues which influenced the new concept of corporate rescue. In *Powdrill v Watson* 1995 (2) AC 394 at 442(A), LORD BROWN WILKINSON referred to a “rescue culture which seeks to preserve viable business”.

In *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Anor* 2011 (5) SA 600 (WCC) at p 603 the court pointed out that business rescue proceedings reflect a legitimate preference for proceedings aimed at the restoration of viable companies rather than their destruction. The concept of corporate rescue is in line with modern trends of corporate rescue regimes. Firstly, it attempts to secure and balance the competing interests of creditors, shareholders and employees. Secondly, it envisages a shift away from having regard to creditors’ interests only. Thirdly, it is predicated on the belief that to preserve a business, the experience and skills of employees might in the end prove to be a better option for creditors. Lastly, it enable creditors to secure a better recovery of their debts from debtors.

In *Koen and Anor v Wedgewood Village Golf & Country Estate (Pty) Ltd and Ors* 2012 (2) SA 378 (WCC) at 383 the court stated that:

“It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socioeconomic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation.”

Corporate rescue proceedings are much more flexible and financially distressed company friendly than judicial management. The purpose is to facilitate the continued existence of a company in a state of solvency and to facilitate a better return on shareholders' income.

In *South African Airways (SOC) Ltd (In Business Rescue) and Ors v National Union of Metalworkers of South Africa obo Members and Ors* 2020 ZALAC 34 at 13 the court said:

“The primary aim of a corporate rescue procedure is not merely to rescue a company business or potentially successful parts of the business. The procedure aims to rescue the whole company or corporate entity. This will naturally include preservation of jobs. Indeed, one of the main drivers for the introduction of the business rescue regime in place of the system of judicial management was the rescue of an ailing business and thus the retention of jobs. This gloss on the purpose of the business rescue provisions is captured by Prof. Anneli Loubser and Mr Tronel Joubert as follows:

‘The preservation of jobs is widely regarded as one of the many economic and social benefits that could result from the successful rescue of a company or business ... the saving of jobs is a high priority for South Africa and the introduction of an effective and successful business rescue procedure was seen by government as an important measure to prevent further job losses. As was to be expected, the protection of the rights and interests of employees in the new business rescue proceedings were emphasised from the early stages of the corporate law reform process. It became evident that employees were to be regarded as stakeholders in a class of their own. In the Memorandum on the Objects of the Companies Bill 2008 it was stated that the new *Chapter 6* 'recognises the interests of shareholders, creditors and employees'. The rest of this part of the document then continued by referring only to the protection of the interests of workers with no further mention of either the creditors or shareholders.’”

It is in light of these developments that the Legislature enacted the current Insolvency Act with the new concept of corporate rescue procedures. Corporate rescue is defined in s 121(1)(b) of the Insolvency Act as follows:

“(b) ‘corporate rescue’ means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for —

- i) the temporary supervision of the company, and of the management of its affairs, business and property; and

- ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company”

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.

THE PROCEDURE AND EFFECT OF CORPORATE RESCUE

The Insolvency Act provides two ways of commencing corporate rescue proceedings.

The first procedure is in terms of s 122(1) of the Insolvency Act, which provides that the board of a company or its shareholders can make a resolution to institute corporate rescue proceedings. This procedure is voluntary and does not require the company to approach a court. The resolution placing the company under supervision can only be taken if the company is financially distressed, in that it is unable to pay its debts and there appears to be reasonable prospects of rescuing the company. For the resolution to be effective, it must be filed with the Master of the High Court, the Registrar of Companies and the Registrar of Cooperative Societies, in the case of a cooperative society. The company must within five business days after filing the resolution notify every “affected person” and appoint a corporate rescue practitioner who satisfies the requirements of s 131 of the Insolvency Act. The responsibility of the corporate rescue practitioner is to oversee management of the company during the corporate rescue proceedings.

The second procedure, which is the procedure adopted in this matter, is made by way of an application to court for an order commencing corporate rescue proceedings. The procedure to be followed in terms of s 124 of the Act is as follows:

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

(2) An applicant in terms of subsection (1) must —

(a) serve a copy of the application on the company, the Master and the Registrar of Companies; and

(b) notify each affected person of the application by standard notice.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(4) After considering an application in terms of subsection (1), the Court may —

(a) make an order placing the company under supervision and commencing corporate rescue proceedings, if the Court is satisfied that —

(i) the company is financially distressed; or

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons; and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.”

The application for corporate rescue is filed before the High Court by any affected person.

Section 121(1)(a) of the Insolvency Act defines “affected person” as follows:

“i) a shareholder or creditor of the company; and

ii) any registered trade union representing employees of the company; and

iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives”.

It therefore follows that if a court is satisfied that the company is financially distressed, or has failed to pay any amount in terms of a public regulation, or contract, with respect to employment related matters, or it is otherwise just and equitable to do so for financial reasons, it may make an order placing the company under supervision and commencing corporate rescue proceedings. Alternatively, the court can dismiss the application and make any further necessary and appropriate orders, which include an order placing the company under liquidation. The court will also appoint a corporate rescue practitioner to manage the affairs of the company.

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. Section 126(1) provides that:

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.”

The mere filing of the application with the Registrar of the High Court, even before the merits of the application are considered, has the effect of commencing corporate rescue proceedings. The temporary moratorium regarding the suspension of the rights of creditors will therefore start at this stage. The law requires the protection of the troubled company’s assets so that corporate rescue practitioners do not inherit shells. This is an important change to the old regime.

In *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Ors* 2016 (6) SA 448 (KZD) at 448 the court dealt with the moratorium on business rescue proceedings. The court held that:

“During business 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 ...”.

During a company’s corporate rescue, the company can only dispose of its assets in circumstances prescribed in s 127(1) of the Insolvency Act. In respect of contracts of employment, the general rule is that employees who were employed by the company before commencement of corporate rescue proceedings will remain employed with no change to their terms and conditions of employment. However, s 129(1)(a) (i)-(ii) of the Insolvency Act provides exceptions to this rule.

Furthermore, the board of directors is deemed to be dissolved during corporate rescue proceedings and directors can no longer exercise their functions as directors. The management of the company is vested in the corporate rescue practitioner. Section 121(1)(d)

of the Insolvency Act defines a corporate rescue practitioner as a person appointed, or two or more persons appointed jointly, to oversee a company during business rescue proceedings. As indicated earlier, he or she is, or they are, appointed by way of company resolution or by court order. To be eligible for appointment one must satisfy the requirements and qualifications spelt out in s 131 of the Insolvency Act.

The powers of a corporate rescue practitioner are set out in s 133(1) (a)–(d) of the Insolvency Act and include full management and control of the company in substitution of the board. He or she can delegate any of his or her powers to a person who was part of the board or pre-existing management of the company, appoint any person as part of management of a company to develop a corporate rescue plan, and implement any corporate rescue plan. Section 136(1) of the Insolvency Act provides for remuneration of the corporate rescue practitioner.

The effect of s 121(1)(c) of the Insolvency Act is to shed light on what a corporate rescue plan is. It is a plan drawn up by the corporate rescue practitioner in consultation with creditors, affected persons, and management of the company, showing how the rescue of the company will be achieved. The contents of a corporate rescue plan are prescribed in s 142 of the Insolvency Act and include background information, proposals, assumptions and conditions.

A corporate rescue plan must be approved by creditors and shareholders at a meeting convened in terms of s 143(1) of the Insolvency Act. During the corporate rescue proceedings, the Act recognises, in ss 137, 138 and 139 respectively, participation rights of employees, creditors, and holders of securities.

Corporate rescue proceedings are not permanent. They are a measure for the temporary supervision of the financially distressed company to bring it back to viability so that it continues as a going concern. In *Koen and Anor supra* at 382 the court expressed the view that it is axiomatic that business rescue proceedings by their very nature must be conducted with the maximum possible expedition.

There is no provision for the automatic or compulsory termination of corporate rescue proceedings in the Insolvency Act. The intention of the Legislature, in s 125(3)(a) of the Insolvency Act, is that corporate rescue proceedings should not take more than three months. In terms of s 125(2)(a)-(c) of the Insolvency Act, corporate rescue proceedings are terminated in one of the following ways - by court order, the filing of a notice of termination with the Master, and by rejection of substandard implementation of a corporate rescue plan.

TEST TO BE APPLIED IN CORPORATE RESCUE PROCEEDINGS

In terms of s 121(1)(b) of the Insolvency Act, the test to be applied when assessing if a company should be placed under corporate rescue is whether or not the company is financially distressed. The exercise involves an objective test, wherein the court is called upon to look at all the financial circumstances of the company including its ability to meet its obligations as they fall due.

Section 121(1)(f) of the Insolvency Act defines the term “financially distressed” as follows:

“(f) ‘financially distressed’, in reference to a particular company at any particular time, means that —

- (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months ...”.

From the first part of the test, it appears that a company will be regarded as being in financial distress if there is a reasonable likelihood that the company may reach a position within the next six months where it will no longer be able to pay its debts as they become due and payable. “Reasonable likelihood” implies that there must be a rational basis for the conclusion that the company may not be able to pay its debts within the next six months.

This conclusion amounts to an informed prediction, based on the current financial position of the company, and considering all relevant factors that may impact on the company’s liquidity in the foreseeable future. These factors include, but are not limited to, the purpose of the company - for example, if it is a mining company whether it is located in an area where there are sufficient mineral reserves and whether the company has adequate machinery and manpower to extract the minerals. The factors to be taken into account also include whether the management of the company is competent and takes its fiduciary duties seriously.

The court in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 WCC created a checklist to be used before a court grants a corporate rescue application. In that case, it was stated that the court needs to consider the following -

- the cause of the financial failure;
- the remedy for the failure;
- whether there is a reasonable prospect that the remedy will be sustainable; and

- whether there are concrete and objective ascertainable details beyond mere speculation that the remedy is sustainable.

The second part of the financial distress investigation deals with insolvency. A company is regarded as technically insolvent (and thus financially distressed) if the liabilities of the company exceed the assets. A court must consider the complete financial position of the company when determining whether there is a reasonable likelihood that the company will be insolvent within six months.

A company will be regarded as being in financial distress where it is insolvent after all other circumstances have been considered, including considering alternative fair values of the assets and liabilities, factoring in reasonably foreseeable assets and liabilities, as well as considering any other proposed measures taken by management such as subordination agreements, recapitalisation or letters of support.

It is also important to bear in mind the fact that corporate rescue proceedings are not for terminally financially distressed corporations. They are for ailing corporations which, given time, can be rescued and become solvent.

In the case of *BNY Corporate Trustee Services Ltd v Eurosail* [2013] UKSC 28 at 42 the court found that the "balance sheet" test for insolvency must take account of the wider commercial context. It stated that courts must look beyond the assets and liabilities used to prepare a company's statutory accounts when deciding whether or not a company is "balance sheet" insolvent. See also *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* [2014] 2 SA 518.

However, identifying when a company is financially distressed is not a straightforward process, with part of the difficulty resting with how the initial assessment of

the financial state of a company is conducted. The evaluation of a company's solvency state relies on somewhat rough benchmarks, often referred to as the cash flow and balance sheet tests. The tests are not intended to be accurate mechanisms employed to determine the exact financial situation of a struggling company, but should be used as a statutory rule to determine whether a company is insolvent for certain legal purposes.

The court will have a basis to conclude that a company is financially distressed, especially in a situation where a company is unable to pay salaries to its employees, trade creditors, and regulatory authorities such as the National Social Security Authority ("NSSA") and the Zimbabwe Revenue Authority ("ZIMRA"). Also, failure to pay statutory obligations such as pensions and the Mining Industry Pension Fund ("MIPF") in the case of mining companies is also an indicator that a company is in financial distress. Other indicators include failure to pay electricity bills, water bills, professional membership fees for senior employees, and insurance policies. Thus, financial distress is associated with liquidity problems.

A reasonable prospect of successful rescue proceedings as envisaged in s 121(1) of the Insolvency Act requires more than a *prima facie* case or an arguable possibility. It was stated in the *Oakdene Square Properties* case 2013 (4) SA 539 (ZASCA) at pp 551-552 that:

"Of even greater significance, I think, is that there must be a reasonable prospect – with emphasis on 'reasonable' – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers".

In support of the above authority, the court in *Al Mayya International Ltd (BVI) v Valley of the Kings Thaba Motswere (Pty) Ltd and Ors* [2017] JOL 38030 (EL), commenting on s 128(1)(b) of the South African Companies Act 2008 which is the equivalent of s 121(1)(b) of the Insolvency Act, expressed the view that:

“The prospect of rescue must accordingly be considered in the light of the objectives of business rescue proceedings contemplated by the definition in terms of section 128(1)(b) of the Act, which are: to facilitate rehabilitation of the company in order to (a) return the company to solvency, or (b) provide a better return for creditors and shareholders than what they would achieve through liquidation. An applicant for business rescue proceedings must thus place before Court a factual foundation for its contention that there are reasonable prospects that the aforementioned objectives can be achieved.”

It appears that the Legislature intended that business rescue be applied in instances where there is a reasonable likelihood that a company may be commercially insolvent (unable to pay its debt) within the immediately ensuing six months, and as such business rescue can be used to rescue or rehabilitate the failing company.

APPLICATION OF THE LAW TO THE FACTS

It appears to the Court that this matter can be disposed of by answering one pertinent issue, which is: **whether or not the failure to comply with the mandatory provisions of the Act rendered the application a nullity.**

It has already been established that s 124 of the Insolvency Act provides for the procedure to be followed when approaching the court for an order of corporate rescue. Section 124(1) provides that:

“124 Court order to commence corporate rescue proceedings

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

The statute is specific in relation to the appropriate applicant who is entitled to make an application for corporate rescue. The statute is specific so as to curb the abuse of the process by parties who may not have a substantial interest in the rehabilitation of a company

as well as parties who may only be interested in their personal financial gain and not the rehabilitation of the company.

In terms of the Insolvency Act, there is no ambiguity as to whom an affected person is. It is either a shareholder, a creditor of the company, a registered trade union representing the employees of the company or the employees of the company who are not represented by a registered trade union. An applicant for corporate rescue is therefore confined to such persons.

In casu, the second respondent cannot be held to be an affected person in terms of the Insolvency Act. It was never alleged by the second respondent that it was a shareholder. Therefore it cannot qualify in terms of the first criterion set out in s 121(1)(a)(i). Instead, the second respondent alleged that it was a creditor because it was in possession of a judgment against the first appellant.

It is apparent from the record that the judgment which the second respondent relied on is a judgment, not against the first appellant, but another company, identified as Metallon Gold, that is based in the United Kingdom. The judgment does not establish that the second respondent was a creditor of any of the appellants. In the absence of any other evidence to prove that indeed the second respondent was a creditor of any of the appellants, the Court cannot possibly clothe the second respondent with creditor status.

The second respondent further alleged that it qualified as an affected person in terms of s 121(1)(a)(ii) of the Insolvency Act, in that it was a registered trade union in the mining industry. The Insolvency Act does not provide for a registered trade union in the industry but specifically provides for a “registered trade union representing the employees of the company”.

Lastly, the second respondent does not qualify as an employee of the company in terms of s 121(1)(a)(iii) of the Insolvency Act. As such, the second respondent does not meet the requirements of an affected person and therefore had no *locus standi* to institute corporate rescue proceedings against the appellants. There is no reason to deviate from the definition of “affected person” prescribed by the Act.

The respondents failed to comply with the provisions of s 124(2) of the Insolvency Act, which made their application a nullity as they failed to comply with peremptory provisions of the statute. Section 124(2) provides that:

“(2) An applicant in terms of subsection (1) **must** —

- a) serve a copy of the application on the company, the Master and the Registrar of Companies; and
- b) notify each **affected person** of the application by **standard notice.**”

Section 2 of the Insolvency Act provides that:

“‘standard notice’ means notice by registered mail, fax, e-mail or personal delivery.”

This provision shows that the court *a quo* misdirected itself when it found that neither the manner of notification nor the form or content of “standard notice” was defined in the Insolvency Act. The court *a quo* went on to express the view that there was a lacuna in the law that needed to be addressed by the Legislature as it created confusion in the procedure.

The court *a quo* failed to appreciate the statutory definition of standard notice as set out in s 2 of the Insolvency Act. It is clear that standard notice can only be effected through registered mail, fax, e-mail or personal delivery. Nowhere in the Act is there a provision for standard notice to be by way of publication in a newspaper. Such notice was a nullity which vitiated the entire proceedings.

Service by way of standard notice is a peremptory requirement as the Act uses the word “must”. Deviation from peremptory requirements of the Act render an application fatally defective. It is imperative to conduct corporate rescue proceedings with the utmost diligence and care as they have far-reaching consequences, not only on the creditors, shareholders and employees of a corporation but the society at large. Corporate rescue is predicated on a broader social justice perspective unlike the old law of judicial management that was based on private corporate interest. Consequently, it is critical that the procedures laid down for corporate rescue be complied with to the letter.

In *Top Trailers (Pty) Ltd and Anor v Kotze* [2017] ZAGPPHC 1268 the court expressed the following sentiments in respect of notification of affected persons:

“How Kotze should have become aware of the business rescue proceedings is not explained by the applicants. The applicants have the obligation to notify all affected persons of the resolution but have not done so and have not proffered any explanation for their breach. They are now approbating and reprobating, demanding that Kotze should perform miracles. The applicants themselves had not complied with the law but are using the same legislation that they disregarded, to achieve a perverted outcome. The Court will not allow itself to be a party to an illegality ...

The main argument relied on by Kotze at the proceedings before JUSTICE KHUMALO was that the resolution placing Top Trailers under business rescue was a nullity because of the company's non-compliance with section 129(3) of the Companies Act. From a reading of the affidavit filed by Kotze at the hearing before JUSTICE KHUMALO, it is clear that Kotze was attacking the resolution adopted by the Board of Directors. The attack was to the effect that because he, as an affected person, was not notified of the resolution as provided for in section 129 of the Companies Act, the resolution stood to be set aside. I cannot disagree with his reasoning on this score ...

I find that Kotze as an affected person, a creditor of the company, should have been notified of the resolution placing Top Trailers under business rescue but he was not notified. The fact that Kotze was not notified clearly infringes on his rights as an affected person and creditor of the company.”

It is apparent that the failure to notify affected persons is not only a breach of peremptory provisions, but it also prejudices affected persons who have a substantial and

legitimate interest in the fate of the company as they are not afforded an opportunity to respond to the application. Ultimately, the outcome of the application may prove to be adverse to them.

The effect of non-compliance by an applicant for corporate rescue with the provisions of the Insolvency Act relating to notifying affected persons by standard notice renders the application a nullity.

DISPOSITION

In the result it is ordered as follows -

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and substituted with the following –
“The applications for corporate rescue under HC 2619/19 and HC 2696/19 be and are hereby dismissed with costs.”

BHUNU JA: I agree

CHIWESHE AJA: I agree

Scanlen & Holderness, appellants' legal practitioners

Gumbo & Associates, second respondent's legal practitioners