MATTHEW TANGENHAMO CHITAKUNYE

Versus

MASTER OF THE HIGH COURT N.O

And

CLAUDIOUS NHEMWA N.O (In his official capacity as Corporate Rescue Practitioner of Frozenburg (Pvt) Ltd (under corporate rescue))

And

FROZENBURG (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 20 February & 25 November 2024

Review application

G. Madzoka for applicant
C.Nhemwa for second and third respondents

CHILIMBE J

BACKGROUND

[1] The procedural overburden which suffocated resuscitation of distressed companies under Zimbabwe`s old Insolvency Act [Chapter 6:04] and Companies Act [Chapter 24:03] was articulated by MALABA CJ in *Metallon Gold Zimbabwe (Pvt) Ltd & 3 Ors v Shatirwa Investments (Pvt) Ltd & 3 Ors* SC 107-21. In the same decision, the Learned Chief Justice dwelt, with equal acuity, on the significant changes to the corporate rescue process introduced by the new Insolvency Act [Chapter 6:07][1].

[2] As a general observation, those changes indeed aim at invigorating the entire process of corporate rescue in the jurisdiction. Accordingly, corporate rescue practitioners under the new regime should fast restore, (unless overwhelmed by insuperable commercial adversity), the

[1] Herein referred to as "the Insolvency Act" or "the Act"

wellness of balance sheet, and fullness of corporate status. With those capabilities, an entity should be able to resume its responsible turn on the economic winnowing line. Unlike the ailing third respondent which, according to applicant in this review application, is unable to deliver on contractual obligation due to debilitation- much to his prejudice.

[3] This review application is brought in terms of section 191 of the Insolvency Act. Applicant seeks a reversal of first respondent`s refusal to remove second respondent from the office of corporate rescue practitioner. Applicant thus urges this court to exercise the latitude granted in section 191 (3) of the Insolvency Act. He prays for the replacement of second respondent, a measure which he argues will greatly mitigate the effects of a soured contractual relationship. Section 191 (3) of the Act provides that; -

> 191(3) The court reviewing any decision, order or taxation may consider the merits of such matter, hear evidence and make any order it considers appropriate.

THE DISPUTE

[4] I set out the fuller background to this matter in an earlier judgment[2] on a preliminary point and will therefore not replicate same herein. But in brief, applicant is the registered holder of title to a piece of land, known as Stand 173 Prospect, in Harare ("Stand 173 Prospect"). He appointed, by written contract dated 21 July 2018, third respondent, a land developer, to facilitate the subdivision and sale of stands on Stand 173. Third respondent failed, according to applicant, to deliver on obligation.

[5] Third respondent was subsequently placed under corporate rescue in terms of the Insolvency Act (in December 2019). Second respondent was appointed the corporate rescue practitioner. Applicant therefore pursued second respondent for the unfulfilled obligations of third respondent. But according to applicant, second respondent fared no better. That failure prompted applicant to file a complaint with first respondent seeking the removal of second respondent in terms of section 79 (2) of the Insolvency Act. This section provides that; -

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[2] *Matthew Tangenhamo Chitakunye v Master of the High Court N.O and Claudious Nhemwa N.O* and *Frozenburg Investments (Pvt) Ltd* HH 413-23 ("HH 413-23").

> 79 (2) The Master may remove a liquidator from office on the ground that he or she has failed to perform satisfactorily any duty imposed upon him or her by this Act or has failed to comply with a lawful demand of the Master.

[6] In that letter dated 9 May 2022, applicant set out the particulars of second respondent`s alleged dereliction. They included loss of independence, conflict of interest, failure to engage third respondent`s debtors and inability to recover third respondent`s dues from its former directors. Second respondent contested these allegations in a 10-page letter dated 27 May 2022. The profuse refutations and protestations of diligence in that letter were dismissed by applicant in a reply dated 25 July 2022 to the first respondent.

[7] In her ruling of 22 September 2022, first respondent dismissed applicant`s complaint. She declined to remove second respondent from the office of corporate rescue practitioner for third respondent. Dissatisfied with that decision, applicant filed the present review proceedings. Therein, he seeks the vacation of (i) first respondent decision and (ii) second respondent`s appointment as corporate rescue practitioner and his replacement by another.

THE REVIEW APPLICATION

[8] Applicant alleged that firstly, the first respondent committed a gross procedural irregularity by reaching a decision on the matter brought before her without calling the parties for a fuller inquiry. Secondly, that the first respondent demonstrated bias and favour toward second respondent, the corporate rescue practitioner. Lastly, applicant contended that in the light of second respondent`s glaring failure to deliver on mandate as corporate rescue practitioner, first respondent`s decision to retain him amounted to a gross irrationality.

[9] The application was opposed by second and third respondents. The opposition mirrored the arguments in second respondent`s refutations of 27 May 2022 to first respondent. Before turning to the arguments presented by both sides, I will comment on general matters relating to corporate rescue and corporate rescue practitioners pre-requisite to the consideration of those arguments.

GENERAL OBSERVATIONS ON COPRPORATE RESCUE AND THE INSOLVENCY ACT

[10] This application directly seeks a review of first respondent`s decision, and by automatic implication, the conduct of second respondent. These two officers are invested with statutory authority under the Insolvency Act. I will comment briefly on each, starting with the first respondent. Her role is central to the entire concept of corporate rescue as set out in the Insolvency Act. Apart from that, first respondent also qualifies as an "administrative authority" in terms of section 2 (1) (d) of the Administrative Justice Act [Chapter 10:28][3]. Her duties and responsibilities under the Insolvency Act are further accentuated by section 3 of the Administrative Justice Act.

[11] In summation, first respondent is obliged in terms of the Insolvency Act and Administrative Justice Act to act fairly and diligently in furtherance of the objects of former Act. These objects, as stated in the *Metallon Gold* decision-are focussed on the speedy revival of stricken corporates.

[12] Additionally, the status of first respondent as an administrative authority invites the court to exercise the powers prescribed in the Administrative Justice Act in tandem with those prescribed by the Insolvency Act[4] in considering the remedies sought by the parties under the present application. I now make a few observations regarding second respondent as the corporate rescue practitioner.

[13] The definition (including qualifications), appointment, mandate, powers, responsibility, supervision, and removal of the corporate rescue practitioner are all provided for under various provisions in the Insolvency Act. Capability, diligence and integrity should be hallmarks of a corporate rescue practitioner (see sections 125,131, 132 (2), 133 and 142 of the Insolvency Act among others). These provisions once again, reiterate the quest of corporate rescue and the pivotal role of the corporate rescue practitioner therein.

[14] Section 125 of the Insolvency Act in particular, sets an ambitious period of 3 months as a target for conclusion of corporate rescue[5]. In discharging his or her function, a corporate rescue

[3] Hereinafter referred to as the "Administrative Justice Act".
[4] Based on course on sections 26, 27 and 28 of the High Court Act [Chapter [7:06]]
[5] This observation is qualified by the discourse in paragraph [43] of this judgment

practitioner must be largely guided by the facility of a corporate rescue plan as provided for in section 142 of the Act. Expressed in simple terms, the corporate rescue plan must assist the corporate rescue practitioner preserve balance sheet and boost the trading book. In doing so he or she will address threats from errant debtors, debilitating creditors including employees, due and undue competition, as well as intrusions of malfeasance among other risks. He or she must deliver all these against a bed of efficiency, accountability, compliance, reporting and disclosure.

[15] In that respect, the corporate rescue practitioner performs a business and statutory function. In that respect, the he or she is well-protected against whimsical interference and removal. This is the view expressed recently by the South African Supreme Court of Appeal in *Knoop N.O & Anor v Chetaali Gupta & Anor* 2021 (3) SA 88 (SCA). Dealing with the issue of removal of corporate rescue practitioners (BRPs), the court per retraced the position and held as follows at [18]; -

> "Under our common law the court has always had and exercised the power to remove trustees and administrators of deceased estates on the ground that their continuation in office would prejudicially affect the proper administration of the estate entrusted to them and prejudice the beneficiaries of that estate. That power extends to the removal of executors, liquidators of companies and trustees in insolvency. Cases dealing with these situations will be instructive in regard to the approach to be adopted to removing BRPs. Two general principles will be that removal is not something to be ordered lightly and that the primary reason justifying removal will be actual or potential prejudice or harm to the interests of the estate, trust or company, and those in whose interests the administration was established, such as heirs in an estate or creditors in circumstances of insolvency."

[16] This approach is reflected in the Insolvency Act itself where removal of the corporate rescue practitioner is can only occur under three heads as provided in section 132 (1) of the Insolvency Act which states that; -

> 132 Removal and replacement of practitioner
>
> (l) A corporate rescue practitioner may be removed only-
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> (a) by a Court order in terms of section 123; or

(b) as provided for in this section; or

(c) by the Master in terms of grounds set out in section 79.

[17] Of immediate relevance is section 79 (2) of the Insolvency Act quoted in *[5]* above. It is important to note that a removal on the grounds of the underlined part of section 79 (2) of the Insolvency Act must be predicated primarily on defective performance. Of course, the term "any duty" casts the net quite widely. But in essence, (i) a party who seeks a corporate rescue practitioner`s removal in terms of section 79 (2) must identify that appointee`s performance aberrations as templated against specific provisions of the Act.

[18] And (ii) where the first respondent is faced with such request, she must similarly evaluate the corporate rescue practitioner`s impugned conduct. Particularly as against the specific allegations as drawn from the Act, and made against him versus his deliveries per the corporate rescue plan. And in doing so, the objectives of corporate rescue per *Metallon Gold Zimbabwe (Pvt) Ltd & 3 Ors v Shatirwa Investments* (supra) must inform the process. As noted at commencement of this judgment, applicant contends that the inefficiencies of corporate rescue have precluded his access to the benefits of due contractual performance.

THE ARGUMENTS ON REVIEW

FAILURE TO CARRY OUT AN INVESIGATION

[19] Against that background, I now turn to the submissions by counsel. Mr. *Madzoka* for applicant argued that first respondent`s decision was irredeemably blemished by irrationality and irregularity. On irregularity, counsel argued that first respondent did not conduct an investigation after receiving applicant`s complaint as prescribed by section 79 (4) of the Act which states that; -

> 79 (4) The Master must in the case of a complaint; evidence or written answers without delay carry out an investigation.

[20] In motivating this point, Mr *Madzoka* contended that no hearing was convened where a canvassing of matters was conducted. He cited the Supreme Court decision of *Master N. O v Takaendesa & Ors* SC 101-22 where the meaning of due or proper inquiry by the Master was discussed. Mr. *Nhemwa* for second and third respondent took the approach that firstly, the Insolvency Act did not define the term "investigation". For that reason, the court was at large

to deduce what the process entailed. Secondly, in the absence of a specific procedure, there was cause to conclude that an examination of detailed written submission sufficed for the purpose of section 79 (4) of the Act.

[21] Thirdly, so submitted Mr. *Nhemwa*, even if the first respondent had committed a misdirection by not conducting a hearing, applicant had not demonstrated that he was prejudiced by the error. He cited the SANDURA JA`s famous dictum in *Nyahuma v Barclays Bank (Pvt) Ltd* 2005 (2) ZLR 435 at 438 F, to the effect that not every procedural irregularity vitiated proceedings. Counsel contended that each side had submitted its papers before first respondent. The submissions were duly considered and a finding issued. In that regard, both parties had been fairly and equally treated before the first respondent.

[22] I observe as follows starting with the definition of "investigation". In *Master N.O v Takaendesa & Ors* (supra) GUVAVA JA cited with approval, this court`s remarks in *Madzingaidze N.O v Katanga Service Station* HH 256-13 [at pages 4-5] to the following effect; -

> "A due inquiry may be described as a fitting or appropriate investigation or research on the subject matter before arriving at a decision. This necessarily involves a consideration of submissions made by all interested parties, including the beneficiaries, and an assessment of what would be appropriate given the circumstances of the matter."

[23] The Learned Judge of Appeal in *Takaendesa* went further to cite *Logan v Morris N. O. & Ors* 1990 (2) ZLR 65 (S) where at 71D-72A, the Supreme Court defined "due inquiry" as being "no more than a practical, financial inquiry". With these remarks in mind, what conclusion can we draw from? Section 79 (4) of the Insolvency Act required second respondent to carry out an investigation without delay. Applicant avers that no investigation was conducted.

[24] Second and third respondent have purported to speak on behalf of the first respondent. They insist that first respondent did carry out her statutory duty. They reach that conclusion, not from an affirmative position, but a deductive one. Though she is before the court, the first respondent has deigned to comment. Her comment on whether or not she carried out an investigation and how she did so would have greatly simplified matters. Including helping answer the question; - what constitutes "investigation".

[25] Yet first respondent had a statutory duty to carry out an investigation in terms of section 79 (4) of the Act. In that investigation she was obliged by section 79 (2) to establish if second respondent as the corporate rescue practitioner "[had] failed to perform satisfactorily *any duty* imposed upon him or her by this Act".

[26] That duty entailed receiving the "complaint" and investigating it. The cited dicta on what constitutes "due inquiry" in *Takaendesa, Madzingaidze* and *Logan v Morris* is instructive. An investigation includes calling for more facts, gathering evidence, interviewing direct or third parties or some such other activity to help establish, as in this case, the veracity of the complaint.

[27] But the herein first respondent dismissed applicant`s complaints as comprising of "bare allegations". This observation betrayed her. Faced with bare allegations in a complaint, she could have challenged applicant to verify them through further facts or evidence. Unless of course the complaint was outrightly spurious, a label neither she nor her co-respondents have attached to the complaint under consideration.

[28] Further, first respondent was seized with a complaint into the conduct of a corporate rescue practitioner whose main obligation was to deliver a serviced and compliant residential estate. What considerations of a technical, regulatory or financial nature did first respondent take into account in processing and eventually discounting applicant`s complaint? I am convinced that first respondent failed in her duty to carry out an investigation herein.

[29] In fact, the question as to whether an inquiry or investigation into a corporate rescue practitioner`s suitability took place, is one that should in real terms, never arise. The Master`s record of findings into a complaint must attest and confirm that such duty was discharged. In the absence of confirmation that she did carry out an investigation, I am inclined to find for the applicant on this ground of review. First respondent`s aberration ventured well beyond the pardonable limits described in *Nyahuma v Barclays Bank*.

[30] Having found as such; I do not believe it becomes necessary to delve into what sort of steps or processes first respondent ought to have taken in conducting her investigation. Other than to reiterate that the facts of a matter and provisions of the Insolvency Act allegedly breached must inform the nature of the inquiries to be so conducted in terms of section 79 (4).

DEMONSTRATION OF BIAS BY FAILING TO ADDRESS PERTINENT MATTERS RAISED

[31] In his founding affidavit, applicant alleged that second respondent was compromised by conflict of interest. There was no distinction between "C. Nhemwa the Lawyer, C. Nhemwa the Conveyancer and C. Nhemwa the Corporate Rescue Practitioner". I must state however, that in his letter of complaint (dated 9 May 2022) to the first respondent, applicant did not specifically raise the issue of second respondent Mr. Nhemwa` s triple roles. His disquiet over conflict of interest and lack of independence, though adverting to this role implicitly, focussed more on a separate set of alleged misdeeds.

[32] That aside, as noted above, first respondent dismissed applicant`s solicitude over second respondent`s conflicted position as "bare allegations". So too did Mr. *Nhemwa* who relied on decisions such as *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 18 (S), *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 (H). But applicant persisted with his allegation that dismissal of his challenge by first respondent evidenced bias on her part.

[33] What constitutes bias as prescribed in the above established authorities may be summed up in the remarks of PONNAN JA in S *v Le Grange* 2009 (2) SA 434 (SCA) at para 21 (cited with approval by GUVAVA JA in *NSSA v Housing Corporation Zimbabwe (Pvt) Ltd & Anor* SC 21-24) that; -

> "……bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office'. In common usage bias describes 'a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."

[34] A reading of the first respondent`s ruling reveals a striking pertinacity adverse to applicant`s case. And the findings on failure to investigate further blemish first respondent`s findings. She commenced by dismissing applicant`s complaint as "bare allegations". This conclusion was not supported by any facts nor reasoning justifying it.

[35] The applicant had pointed out the corporate rescue practitioner's alleged failings in his complaint. Such allegations, as against an officer of the stature and responsibility of second respondent were alarming. Subsequent to this cursory dismissal of applicant`s complaint, the first respondent did confess that the corporate rescue proceedings had endured for longer "than anticipated".

[36] Despite that negative finding as against second respondent, first respondent did not dig deeper to establish why. She still retained his commission. The reason furnished for such retention was that it would not be in the best interests of third respondent and its creditors to remove second respondent. Again, the matters constituting the prejudice or disadvantage likely to befall third respondent and the "other creditors" were not particularised. Nor was there a cogent discussion on the challenges encountered and progress attained in the corporate rescue proceedings.

[37] First respondent`s cursory, ineffectual and hurried disposal of applicant`s complaint as against the retention of second respondent in office justifies the allegation of bias raised by the applicant. This fact being underscored by the fact that the ruling was made following a complete departure from the procedure set out in section 79 (4) of the Insolvency Act. On that basis, I make a finding for the applicant on this ground of review.

GROSS IRRATIONALITY IN RENDERING A DECISION WHICH NO COURT OR TRIBUNAL WOULD HAVE REACHED

[38] The palpable irrationality behind first respondent`s decision, according to Mr. *Madzoka*, is evidenced by her disregard of the binding provisions of section 125 (3) of the Insolvency Act. Counsel submitted that this section essentially limited corporate rescue to a period of 3 months from date of commencement. Thereafter, the corporate rescue practitioner was obliged to file monthly reports to the court, the Master and each affected person, a formality which second respondent was and report periodically on progress made. Second respondent was in clear breach of such duty.

[39] Secondly, counsel also dwelt with considerable emphasis, on the question of second respondent`s conflict of interest as earlier noted. That disability emanated from admitted facts before first respondent, so submitted Mr. *Madzoka.* Second respondent was had a pre-existing

relationship with third respondent, a fact which clouded his judgment, independence and partiality.

[40] First respondent ought to have been properly swayed by those considerations into granting the prayer sought, argued Mr. *Madzoka*. Counsel cited the South African decisions of *Hudson & Ors NNO v Wilkins N.O & Ors* 2003 (6) SA 234 (T) and *African Banking Corporation Ltd v Kariba Furniture Manufacturers* 2015 (5) SA 192 (SCA) where it was held in the earlier decision that; -

> *"[13]* A liquidator may be removed from office if there is sufficient suspicion of partiality or conflict of interest, since a liquidator must be and appear to be independent and impartial. He or she must be seen to be independent since his duties as liquidator may require him or her to investigate. (See *Re Giant Resources Ltd* [1991] 1 Qd R 107 at 117; *Re National Safety Council of Australia* (Vic Division) [1990] VR 29 ([1989] 15 ACLR 355 (SC Vic); *City & Suburban Ltd v Smith* [1998] 28 ACSR 328 (FC of A) at 336.) A Court will exercise its discretion to remove a liquidator if it appears that he or she, through some relationship, direct or indirect, with the company or its management or any particular person concerned in its affairs, is in a position of actual or apparent conflict of interest. In exercising that discretion Bowen LJ in *Re Adam: Eyton Ltd: Ex parte Charlesworth* (1887) 36 Ch D 299 at 306 said:
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> 'Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of course is the substantial and real interest of liquidation.'"

[41] The substantive response by Mr *Nhemwa* on second respondent`s alleged failure to observe the reporting conditions set out in section 125 (3) of the Act was brief. The three-month period set in the Act for completion of corporate rescue proceedings was impracticably short. As such, corporate rescue proceedings generally extend beyond that period as a matter of course. As already noted, counsel dismissed, as first respondent did, the questions of conflict of interest and lack of independence as bare allegations.

[42] I turn to examine the arguments. I commence with the remarks by MATHONSI JA in *Basera v The Registrar of the Supreme Court & 3 Others* SC 35-22 at page 4 that; -

> "Under this form of review, and as INNES CJ stated, a Court or a Judge reviews the proceedings or decisions complained of and sets them aside or corrects them, if (a) a public official disregards important provisions of a statute that imposes obligations on him or her; (b)a public official is guilty of gross irregularity. It is settled law that a decision will be irregular and irrational, where the decision-making body has arrived at a decision; "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." See *Secretary for Transport & Anor* v *Makwavarara* 1991 (1) ZLR 18 (S) at 20. A decision would also be irrational if it is irreconcilable with the facts that were before the decision-maker."

[43] Applying the above test to the arguments and facts in issue, I observe as follows; -the first respondent stated in her ruling that the corporate rescue proceedings had taken inordinately long to conclude. What she may not have stated (nor noted) is that despite his detailed report, the corporate rescue practitioner was nowhere near conclusion of the task at hand. This fact stood against applicant`s reiteration that such state of affairs constituted continual financial prejudice. Section 125 (3) of the Insolvency Act does not, as incorrectly submitted by Mr. *Nhemwa*, limit the process to a period of three months.

[44] That provision merely places an obligation upon that practitioner who requires a period longer than 3 months, to account on a monthly basis to the court, the Master and affected persons. This requirement is clearly consonant with the overall objectives of corporate rescue; -to deliver a struggling corporate as swiftly as possible back to commercial viability. Second respondent not only failed in such duty, but appeared quite unaware of it. This is a point which first respondent ought to have picked out instantly given her duty in terms of section 79 (2) of the Act.

[45] The allegations of conflict of interest and lack of independence were quite grave. The Insolvency Act prescribes that a corporate rescue practitioner should be a person who; -

> 131 (1) (d) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;
>
> In HH 413-23 I made the following observations; -

> *[28]* ….Mr. Claudius Nhemwa is a legal practitioner who has claimed separate legal personality from C. Nhemwa and Associates; this being the sole practice run by the very same Mr. Claudius Nhemwa; which law firm acted for an entity known as Frozenburg, which Frozenburg had entered into in a Land Development Contract with applicant; being the transaction during whose currency Frozenburg found itself placed under corporate rescue; which corporate rescue proceedings saw Mr. Claudius Nhemwa-the same legal practitioner and sole partner - being appointed the corporate rescue practitioner of Frozenburg; which Frozenburg and Mr. Claudius Nhemwa N.O have now been sued, together with the Master, under the present review proceedings and appear as litigants; the same litigants who are both represented by Mr. Claudius *Nhemwa* as its, and his legal practitioner respectively.
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> *[29]* It is not necessary to unpack the above relationships any further. I do recognise however, that Mr. Nhemwa' s conduct has been besmirched in each and every capacity that he has acted as outlined above. The latest being that as the counsel representing the second and third respondents herein, he has raised in these proceedings, baseless points in limine. I have reiterated that Mr. Nhemwa' s recriminations against all the allegations raised against him (in his various capacities), have been persistently emphatic.

[46] Despite this background, first respondent dismissed a complaint thereinto as baseless. In addition, the first respondent`s mind was not triggered to consider the import of a corporate rescue plan for third respondent as required in terms of section 142 of the Act. This tool would have aided her evaluate more technically, the allegations against second respondent.

[47] A reading of the third respondent`s ruling and reasons thereof as noted above, shows a cursory approach to the entire matter. That approach was inconsistent with the general statutory obligations placed upon her as a statutory officer. Both in terms of the Insolvency Act as well as the Administrative Justice Act. I find myself in agreement with Mr. *Madzoka* that the first respondent`s decision was so blighted by defects that it falls into the irredeemable class of irrational and irregular decisions. As such, the decision must be vacated.

THE RELIEF SOUGHT BY APPLICANT

EXERCISE OF THE COURT`S POWER IN TERMS OF SECTION 191 (3) OF THE INSOLVENCY ACT AS READ WITH SECTION 26 OF THE HIGH COURT ACT, AND SECTION 4 OF THE ADMINISTRATIVE JUSTICE ACT

[48] Applicant seeks the discharge of second respondent from office and replacement by another. The application, as noted, was brought in terms of section 191 which empowers this court to "...make an order it considers appropriate". That provision in my view, generates a latitude for this court to craft a remedy that best addresses the justice of this case.

[49] In crafting such solution, the court must be guided by the strictures set out by the Supreme Court in *Phillip Ndlovu N.O v Commercial Bank of Zimbabwe & Anor* SC 27-17 where the court was dealing with section 222 (3) of the Companies Act [*Chapter 24:03*] which provided that; -

> 222 (3) Any person aggrieved by any act or decision of the liquidator may apply to the court after notice of motion to the liquidator and therein the court may make such order as it thinks.

[50] In defining the phrase "...make such order as it thinks...", the Supreme Court per UCHENA JA held as follows; -

> "The meaning of the words "as it thinks" must be ascertained from the power the High Court exercises in terms of s 222 (3). The court cannot think anyhow. It must think judiciously. A court thinks judiciously when its thinking is guided by the law. It must think within the parameters of the powers given to it by the law. Section 222 (3) does not entitle a court to think outside the provisions of the law as set out by statutes and common law. The thoughts of a court must be guided by the facts found proved and the law applicable to such facts.
>
> The applicant should therefore establish a basis for the court to interfere with the decision of the liquidator. If the applicant fails to do so the court must confirm the decision of the liquidator. If it cannot confirm the decision for some defect in the decision-making process it can make an order in terms of its review powers. The court's entitlement to make such order as "it thinks" does not mean it can make any order it thinks fit even if such order cannot be justified by the facts of the case and the law. A court order is a product of the facts of the case and the law applicable to such

> facts. The court should therefore judiciously make an order as can be justified by the facts and the applicable law."

[51] Against this guidance, I turn to consider the relief sought by applicant. He seeks, under the review procedure of section 191 of the Act, the removal and replacement of second respondent from the office of corporate rescue practitioner. Two questions arise from that request. Firstly, *can that relief be competently granted* as an exercise of the court`s power set out in section 193(3) of the Act to "…. make any order it considers appropriate… *"*[6]*?* If the answer thereto is in the affirmative, the second question arises; - *should that relief be herein granted* on the basis of the facts before the court?

[52] I will deal with the first question whose short answer is a "yes". The starting point being the court`s general powers of review set out in sections 26 and 28 of the High Court Act. Section 28 empowers the court to set aside or correct the decision reviewed, "...subject to any other law...". Herein the "any other law" being (i) the Insolvency Act and (ii) the Administrative Justice Act by section 4 thereof as shall be shortly demonstrated.

[53] Starting with the Insolvency Act, this court can, under the aegis of section 193 (3), order the removal of a corporate rescue practitioner? It can. But the removal of a corporate rescue practitioner can only be done through the 3 scenarios listed in section 132 (2). Which means that the court`s power in section 191 (3) must be expressed through the options (and procedure) available under section 132 (2) which provides as follows; -

> 132 (2) Upon request of an affected person, or on its own motion, the Court may remove a corporate rescue practitioner from office on any of the following grounds
> (a) incompetence or failure to perform the duties of a corporate rescue practitioner of the particular company;
> (b) failure to exercise the proper degree of care in the performance of the corporate rescue practitioner's functions;
> (c) engaging in illegal acts or conduct
> (d) if the corporate rescue practitioner no longer satisfies the requirements set out in section 131 (1);

[6] I will not, for that purpose ascribe too wide a difference in meaning between the words *"…make such order as it thinks…"* and section 191 (3) of the Act`s *"…. make any order it considers appropriate…"*

(e) conflict of interest or lack of independence;

(f)the corporate rescue practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.

[54] On the facts before the court, other than perhaps subsection 132(2) (d), the rest of the above provisions would not avail. For the simple reason that the court would require a conclusive position on the facts on those matters listed in 132 (2) (a), (c), (d), (e), (f) before it can intervene. And such facts are unavailable owing to the absence of a proper investigation into the conduct of second respondent as earlier stated.

[55] But a different scenario arises from section 132(2) (b). This subsection refers to section 131 (1) which in turn carries a disjunctive list of disqualifiers. One of these disqualifiers becomes relevant for present purposes. Section 131 (1) (d) provides that a person shall be appointed as (or retain office of) corporate rescue practitioner only if he or she; -

> "Does not have <u>any other relationship with the company</u> such as **would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;"**

[56] Given the discourse into second respondent`s multiple roles, a case is made for him to answer under this section. Which brings in the second question; whether the relief prayed for by applicant ***<u>should</u>*** be granted? The other short answer is no and below are the reasons. The path traced from the first question raised above to the discourse on section 131 (d) was antecedent to the exercise of the court`s powers of review generally and in terms of section 191 (3) of the Insolvency Act.

[57] But it is not a route that was proposed by the applicant nor ventilated by both sides in argument. In other words, the parties did not have an opportunity to input into it. As such, I believe it would not be proper to thereafter proceed and determine the matter on the basis of a legal point that has neither been considered nor argued by the "owners" of the controversy.

[58] Secondly, and in any event, the crux of the herein application is failure by the first respondent to investigate applicant`s complaint. Consequently, the second respondent`s culpability or blamelessness under the Act could not be ascertained. Those findings could have also empowered this court into taking a robust view and disposing of the matter.

[59] It did cross my mind to utilise the option to "hear evidence" provided in section 191 (3) of the Insolvency Act. I discounted same for two reasons; - firstly the parties neither pleaded such it in their papers nor did they raise it in argument. Secondly, I paid heed to the commercial, regulatory, and managerial specialities associated with the subject of reviving a struggling corporate as noted in paragraph [14] above.

[60] These technical and special matters lie in the province of first respondent as a statutory officer appointed to deal with them. As such, I believe it best to defer to the expertise of second respondent in that regard. This being the point that UCHENA JA in *Ndlovu v Commercial Bank of Zimbabwe* addressed by urging courts to devolve, in appropriate circumstances, matters to the expertise of appointed specialists. UCHENA JA thus referred with approval to a passage on judicial deference from a learned author[7] who was cited by CAMERON JA in paragraph *Logbro Properties CC v Bedderson N.O* & *Ors* 2003 (2) SA 460 (SCA) [21] that; -

> "—a judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constrains under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for …… and the consequences of …… judicial intervention. **Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal"**.

DISPOSITION

[61] I will subscribe to the above wisdom. It would be just and proper that this matter be remitted to first respondent to deal with again in terms of section 72(4) of the Act. I carry the presumption that the findings on bias and dereliction as against first respondent will only serve

[7] John Dugard Human Rights and the South African Legal Order (1978) at 320 - 1, 323.

to remediate and enhance, rather than aggravate the first respondent`s interventions under a fresh remittal.

[62] The preceding observations and conclusions in this judgment as well as the terms of the below order should further guide the first respondent in so dealing with the matter. The overriding consideration is to colour the remittal with pragmatic options necessary to support the corporate rescue process. For that reason, I will resort to the facilities under section 4 of the Administrative Justice Act.

[63] This provision enables the court to craft apt remedies without committing the judicial taboos noted in *Nzara & Ors* v *Kashumba* & *Ors* 2018 (1) ZLR 194 and *Ndlovu v Commercial Bank of Zimbabwe*. These authorities cautioned the court against superimposing its preference over the will of the parties. Sections 4 (2) and 4(3) of the Administrative Justice Act provide that; -

> (2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate;
>
> a) confirm or set aside the decision concerned;
> b) refer the matter back to the administrative authority concerned for consideration or reconsideration;
> c) direct the administrative authority to take administrative action within the relevant period specified by law or if no such period is specified, within a period fixed by the High Court;
> d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law, or if no such period is specified, within a period fixed by the High Court;
> e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section three;
>
> 3)Directions in subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision, and directions to ensure compliance by the administrative authority with the relevant law or empowering provision. Based on the aforegoing,

It is hereby ordered THAT; -

1. The application for review be and is hereby granted in part.
2. The decision of the first respondent dated 22 September 2022 be and is hereby set aside.
3. Subject to paragraph 4 of this Order, this matter be and is hereby remitted to the first respondent with the following directions; -
    i) That first respondent conducts an investigation in terms of section 79 of the Insolvency Act [Chapter 6:07] into the suitability of second respondent to continue in the office of corporate rescue practitioner for third respondent following a complaint raised by applicant dated 9 May 2022
    ii) That in complying with paragraph 3.i) of this Order, first respondent to exercise her discretion as guided by the provisions of the said insolvency Act and section 3 of the Administrative Justice Act [Chapter 10:28] and; -
    iii) That in addition, but without circumscribing her discretion and latitude in that regard, first respondent may, call for updated written submissions from the parties to these proceedings, inspect and inquire into the corporate rescue plan, invite the parties to make oral submissions, and inquire from, and or invite third parties including but not limited to regulatory authorities, creditors, directors and affected parties to assist in her investigation;
    iv) That first respondent to set out in writing and serve on the parties to these proceedings, and affected persons within 7 days of this Order, a programme outlining the procedure or roadmap to be followed in complying with the terms of this Order, as well as any directions she may wish to issue to the said parties and affected persons,
    v) That the first respondent to conclude her reconsideration of this matter, inclusive of the investigations, and render a ruling within sixty (60) days of the date of this Order,
4. That should applicant elect to pursue other remedies available to him under the Insolvency Act [Chapter 6:07] or any other law and desire in that regard, to withdraw his complaint, he shall so notify first respondent who, if the notification is received by her prior to commencement of the investigation, may consider the matter as closed and will be released from the directions of paragraph 3 of this Order.

5. In the event that applicant elects not to further pursue the matter after commencement by first respondent of her investigations pursuant to paragraph 3 of this Order, the matter shall be addressed entirely at her discretion.
6. That each party to bear its own costs.

Coghlan, Welsh and Guest- applicant`s legal practitioners
C.Nhemwa and Associates-second and third respondent`s legal practitioners.

[CHILIMBE J____25/11/24]