STANLEY MATUNHIRE
versus
MAZOWE MINING COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSHURE J
HARARE, 12 February & 10 June 2025

Application for leave to sue

T. Kabuya, for the applicant
P. Mujegu, for the respondent

MUSHURE J:

INTRODUCTION

[1] The central issue in this application is whether or not this is an appropriate case for me to exercise my discretion and grant the applicant leave to sue the respondent, his erstwhile employer. The respondent is currently subject to corporate rescue proceedings filed in the Commercial Division of this Court in terms of s125 (1) (b) of the Insolvency Act [*Chapter 6:07*] ('the Act') under case number HCHC84/24.

[2] By dint of the corporate rescue proceedings, there exists a general moratorium on legal proceedings against the respondent. The applicant cannot sue the respondent without leave of the court. In compliance with the provisions of s126 (1) (b) of the Act, the applicant is motivating this court to grant him such leave.

BACKGROUND

[3] The factual conspectus giving rise to this application is not in material dispute. It is that the applicant was engaged as the respondent's Underground Manager Paterson Grade G4 between May and June 2018. On 1 March 2019, he was appointed as the respondent's Statutory Manager and acting Operations Mining Manager. The employment relationship was seemingly marred by irreconcilable differences to the point that on 24 November 2023, the applicant applied to a Principal Labour Officer with the Ministry of Public Service, Labour and Social Services for conciliation. In his application, the applicant laid

allegations of non-payment of salaries and benefits, as well as unfair labour practices, harassment and violence against the respondent.

[4] From the papers filed of record, negotiations for a settlement ensued and the parties agreed to mutually terminate the employment contract. To give effect to the mutual termination, a memorandum of agreement was prepared wherein the applicant was awarded two-hundred and twenty-thousand United States dollars (US$220 000,00) in full and final settlement of the applicant's claims against the respondent. The award would be paid in three instalments by 31 March 2024 for the first instalment, by 30 April 2024 for the second instalment and by 30 May 2024 for the last instalment.

[5] The applicant proceeded to sign this agreement. A copy of the agreement was then delivered to the respondent on 21 March 2024 for the respondent's signature. It is common cause that the respondent did not sign the agreement.

[6] It would seem that at the time the parties were negotiating the memorandum of agreement, the conciliation proceedings were set to be heard on 27 March 2024. On the eve of the hearing, the respondent wrote a letter advising the labour officer of the corporate rescue proceedings and the consequent legal requirements in light of the provisions of s125 (1) (b) and s126 of the Act.

[7] What became of that process has not been revealed before this court but going by the record, the applicant started demanding that the respondent honours its side of the bargain. On 22 April 2024, the respondent requested a revision of the instalment due dates so that the first payment would be paid by 30 May 2024, and the subsequent payments every month thereafter. In making this request, the respondent reasoned that its mining operations had been seriously disrupted by illegal miners who invaded its mining location in February and March 2024. The respondent also indicated that this invasion had affected its capacity to fulfil the payment and that it was in the process of evicting the illegal miners.

[8] The applicant acceded to this variation through an e-mail dated 24 April 2024. In the same e-mail, the applicant requested the respondent to effect the amendments and to send the amended draft. This was done on 26 April 2024. In forwarding the amended agreement, the respondent undertook to forward a signed copy of that agreement. It did not. The contents of the revised agreement have not been placed before this court, neither has the applicant indicated what became of it after receiving it. However, what is clear is that the applicant has petitioned this court to grant him leave on the basis of the original agreement.

[9] Should leave be granted, the applicant intends to file an application for a *declaratur* that the agreement signed by the applicant on 20 March 2024 is binding and enforceable at law and that the respondent be ordered to pay the applicant the arrear benefits. Further, the applicant seeks for this court to order that the respondent has breached the provisions of the agreement dated 20 March 2024 so the amount is deemed due and payable forthwith. The applicant also seeks that the court orders the respondent to pay costs on a legal practitioner and client scale.

[10] The respondent has opposed the application. It argues, in *limine*, that the application is fatally defective because the applicant has filed a chamber application instead of a court application. The respondent also argues that the application is premature because corporate rescue proceedings are meant to benefit all creditors and afford a distressed company an opportunity to resuscitate its business. Thirdly, the respondent argues that the applicant's claim arises from an employment relationship and payment of terminal benefits which is conveniently disguised as a *declaratur*. It argues that this court does not have jurisdiction to deal with labour matters.

[11] On the merits, the respondent admits that the parties agreed on the applicant's termination of employment and payment of US$220 000 as benefits. The respondent states that its mine has been invaded by illegal miners and it is in the process of following due process to have them evicted. This, the respondent states, further, has hampered production at the mine and this is the sole reason why the applicant has not paid the award. The respondent submits that once it resumes production at the mine, it will have the capacity to pay the sums due to the applicant.

[12] In the same breath, the respondent argues that the applicant has not satisfied the requirements for the relief he seeks.

[13] For these reasons, it prays that the application be dismissed.

ISSUES FOR DETERMINATION

[14] From the submissions before this court, I deduce the issues to be determined by this court to be:-

i. Whether or not the application is fatally defective;
ii. Whether or not the application is premature;
iii. Whether or not this court does not have jurisdiction to deal with this matter; and
iv. Whether or not this is an appropriate case to grant leave.

I turn now to deal with each of these issues in turn.

WHETHER OR NOT THE APPLICATION IS FATALLY DEFECTIVE

[15] The respondent's preliminary point in this regard is not novel. It is an issue that has been determined by this court. In *Duatlet Investments (Pvt) Ltd & Anor* v *Hofisi & Ors* HH74-22 at p.5 DEME J commented that:-

> "With respect to the issue of whether or not the present matter ought to have been brought by way of court application instead of urgent chamber application. The word "court" specified in Section 126(1) (b) of the Insolvency Act, [*Chapter 6:07*] does not necessarily suggest that the leave must be sought through court application. Court has been used in the broadest sense."

[16] In my view, on the authority of *Duatlet Investments* (*supra*), the respondent's argument is misplaced. On that basis alone, it ought to fail.

[17] But, even assuming the argument was proper, the rules of this court are clear. In terms of r58 (13) of the High Court Rules, 2021, the fact that an applicant has instituted a chamber application when he or she should have proceeded by way of a court application is not in itself a ground for dismissing an application. The exception to this rule arises where some prejudice has been occasioned by the failure to institute the application in its proper form and such prejudice cannot be remedied by directions for the service of the application on the aggrieved party with or without an appropriate order as to costs.

[18] In considering the question of prejudice, I have perused the application filed by the applicant. The application informs the respondent, if it so wishes, to file opposing papers in a specified manner and within a specified time limit. It also warns the respondent that if it fails to do the needful, the application would be dealt with as an unopposed application. There has been no argument that the respondent has been prejudiced in any way by the fact that the applicant has filed this application in the form of a chamber application. I believe this is because there is none, but the respondent has decided, as a matter of fashion, to raise a preliminary point which is not only without merit but also not dispositive of the matter.

[19] In my analysis, I do not find any prejudice in the format adopted by the applicant to the extent that the respondent has been informed of its plethora of procedural rights and has in fact been able to defend this matter. There is nothing to demonstrate any defect going to the root of the application so as to render it a nullity. For these reasons, I find the preliminary point unmerited and therefore dismiss it.

WHETHER OR NOT THE APPLICATION IS PREMATURE

[20] An argument is made that the applicant has prematurely approached the court. A further argument is made that the appropriate course of action would have been for the applicant to prove his claim in terms of s140 (1) (a) (ii) of the Act at the time a creditors meeting is held. Section 140 (1) (a) (ii) provides for the convention of the first meeting of creditors by the Master of the High Court within fifteen business days of the appointment of a corporate rescue practitioner.

[21] While it may be convenient for a party to wait for a creditor's meeting, nothing precludes the party from seeking leave to sue a company under corporate rescue. That is the whole essence of s126 of the Act. The section has been specifically enacted to allow a party, in spite of an ongoing corporate rescue process, to seek leave to sue the company undergoing corporate rescue proceedings. There can therefore be no argument that an applicant who is desirous of suing the company through the legislative window under s126 has prematurely approached the court. It remains for a court seized with the application to determine whether or not leave is warranted but the applicant is not barred from seeking relief in terms of the provisions of the current law in this jurisdiction. I am therefore not convinced that this preliminary point has merit and proceed to dismiss it.

WHETHER OR NOT THIS COURT DOES NOT HAVE JURISDICTION TO DEAL WITH THIS MATTER

[22] It appears to me that the respondent's challenge on the jurisdiction of the court is predicated on the proposed application should leave to sue be granted. In my view, by overreaching into the intended application to support its argument on jurisdiction in the present matter, the respondent is conflating issues. The matter before me is an application for leave to sue. It is made in terms of the Insolvency Act. The relevant section prescribes that a person requiring leave to sue must obtain such leave from a court. The interpretation section of the Act defines a court as the High Court of Zimbabwe and for the purposes of certain specified sections, a magistrates' court. There can therefore be no debate that this court is not clothed with the requisite jurisdiction to hear the current application when such jurisdiction is conferred by statutory command. On this basis, this preliminary point suffers the same fate as the other two points. It stands to be dismissed for want of merit.

WHETHER OR NOT THIS IS AN APPROPRIATE CASE TO GRANT LEAVE

[23] In terms of the jurisprudence emerging from this jurisdiction, the factors a court may take into account in determining an application for leave to sue a company under corporate rescue are not exhaustive: See *Rio Zim (Private) Limited* v *Trust Bank Corporation Limited (In Liquidation)* SC87-21 and *GN Mlotshwa & Co Legal Practitioners* v *David Whitehead Textiles Ltd & Ors* 2017 (1) ZLR 231 (H) at p236B-C. However, the overriding consideration should be the need for the court to secure and balance the competing interests of all creditors, shareholders and employees of the company under corporate rescue and to promote a rescue culture which seeks to preserve viable businesses: *Metallon Gold Zimbabwe (Private) Limited & Ors* v *Shatirwa Investments (Private) Limited & Ors* SC107-21.

[24] In considering whether this is an appropriate case in which I should exercise my discretion and grant leave, I noted that at the time the applicant and the respondent were negotiating the applicant's termination package, the corporate rescue proceedings had already commenced. Only on the eve of the hearing of the conciliation proceedings did the respondent choose to wave the corporate rescue card. I formed the opinion that the respondent may have negotiated in bad faith, knowing fully well that it would cry corporate rescue at the thirteenth hour.

[25] I therefore took the view that it was necessary to refer to the record under HCHC 84-24, as I am empowered to do on the authority of the Supreme Court's decision in *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (SC). I accordingly directed the respondent to furnish the record. Although the respondent took its time to do so, a peek into the record has helped to shed light on the corporate rescue proceedings. I note that on HCHC84-24, the application was filed on 15 February 2024. This means that the conciliation proceedings which were instituted in November 2023 predated the corporate rescue proceedings. The proceedings were initiated by three applicants identifying themselves as the respondent's employees. Their designations show that just like the applicant in *casu*, they are at the respondent's top management level namely Human Resources Manager, Metallurgical Manager and Chief Security Officer.

[26] The record also shows that the respondent is vehemently opposed to being placed under corporate rescue. It argues, among other issues, that the applicants under HCHC84-24 who purport to be its employees are no longer its employees but former

employees who have accepted terms for the mutual termination of their employment contracts. It also argues that a previous corporate rescue process left it with a trail of debts and oppressive contracts which it is battling to detangle itself from. The answering affidavits filed by the applicants in that matter confirm the negotiations for mutual separation, with the only difference being that they allege that such negotiations have yet not been concluded.

[27] In considering an application of this nature, I am enjoined to investigate the intended litigation and decide on its impact. In this regard, I observe that while the averments in the corporate rescue proceedings have not been tested, it appears to me that there is a myriad of issues negatively confronting the respondent's day to day operations including litigation at different fora by the respondent's top employees or former top employees. In such a scenario and in the spirit of corporate rescue, I would be inclined to protect the respondent from a multiplicity of legal proceedings which, as observed in *GN Mlotshwa* (*supra*), could be both expensive and time consuming thereby potentially defeating the corporate rescue process.

[28] I have already alluded to the fact that in the event that this application is successful, the substantive application would be for a *declaratur* and consequential relief. The applicant seeks to be paid a sum of two-hundred and twenty-thousand United States dollars (US$220 000). To me, the fact that the respondent has requested to pay the amount in instalments shows that this is not a small amount to the respondent. In my view, one cannot underemphasise the potential of the litigation to defeat the facilitation of the respondent's continued existence in a state of solvency, against the letter and spirit of corporate rescue proceedings.

[29] A further issue warrants careful consideration, namely, an assessment of the prospects of success of the intended application. The applicant had a contract of employment with the respondent. The parties agreed to mutually terminate the contract of employment. A memorandum of agreement setting out the terms of the termination was prepared and amended but not signed by the respondent. This agreement is not disputed by the respondent. The applicant intends to petition this court to declare that the agreement is binding and enforceable at law and consequently, the respondent is obligated to pay the sum of two-hundred and twenty thousand United States dollars.

[30] In *Nyanzara* v *Mbada Diamonds (Pvt) Ltd* 2016 (1) ZLR 195 (H), this court had occasion to ventilate the fate of an application as the one in *casu* where there is some

form of an acknowledgement of debt. The court concluded that where there is a valid acknowledgement of debt, an employee can properly sue for relief in this court on the strength of that acknowledgement of debt. The court was however quick to define an acknowledgement of debt as a document which contains an unequivocal admission of liability by the debtor.

[31] The court went on to observe that the amount owed by the debtor must be specified and so should the manner and time of payment. The acknowledgement of debt must pass the test of a liquid document in that it must prove the debtor's indebtedness without extraneous or outside evidence. In *casu*, from the trail of communication exchanged between the parties, after the original agreement, it was varied to reflect revised due dates for payment. That revised agreement is not before me. Additionally, it is common cause that the document was not even signed.

[32] CHITAPI J makes pertinent observations in the *Nyanzara* case (*supra*) at p202 C-H which I am of the view disposes of this matter. The court, after considering the application before it, concluded that the applicant's claim therein was essentially a claim for payment of terminal benefits arising from a terminated contract of employment. The court went on to consider the provisions of s13 of the Labour Act [*Chapter 28:01*] and concluded that the legislature has codified the cause of action involving failure by an employer to pay within a reasonable time post termination of employment, wages and benefits as set out in the said s13 of the Labour Act.

[33] For completeness, s13 of the Labour Act provides that:

> "**13 Wages and benefits upon termination of employment**
> (1) Subject to this Act or any regulations made in terms of this Act, whether any person—
> (a) is dismissed from his employment or his employment is otherwise terminated; or
> (b) resigns from his employment; or
> (c) is incapacitated from performing his work; or
> (d) dies;
> he or his estate, as the case may be, shall be entitled to the wages and benefits due to him up to the time of such dismissal, termination, resignation, incapacitation or death, as the case may be, including benefits with respect to any outstanding vacation and notice period, medical aid, social security and any pension, and the employer concerned shall pay such entitlements to such person or his estate, as the case may be, as soon as reasonably practicable after such event, and failure to do so shall constitute an unfair labour practice."

[34] The court remarked that such a failure by an employer to pay constitutes an unfair labour practice and that such an employee's remedy would lie in the Labour Court. The court then reasoned that:-

> 'In my analysis, the applicant's claim involved the failure by his ex-employer to pay the applicant wages and benefits to which he is entitled. It matters not in my view that the employer may have acknowledged itself to be indebted to the employee nor signed a document to that effect by whatever name called. *The fact is that what would have been admitted to in such a document will be unpaid wages or benefits. For as long as the acknowledgment involves non-payment of wages and benefits as listed in s 13 of the Labour Act, then the wrong done to the employee is as defined in the section, i.e. an unfair labour practice. It being an unfair labour practice, it must be dealt with in terms of the Labour Act.*
> Section 89(1) of the Labour Act provides for the hearing by the Labour Court of applications as set out therein and in particular for the referral of a dispute to a labour officer. Section 89(6) of the Labour Act provides that only the Labour Court should act as the court of first instance in hearing and determining matters set out in s 89 (1) of the said Act. In this case, the applicant has brought an application before the High Court to remedy an unfair labour dispute. I hold that the applicant has brought his application before the wrong court and should have filed the same before the Labour Court. The High Court in my view has had its jurisdiction in respect of this matter ousted by s 89(6) of the Labour Act i.e. to bring such an application to this court as a court of first instance. It appears to me that the Labour Court is the correct forum for an Employee to seek a remedy as a court of first instance where the Employer has breached s 13 of the Labour Act. *The fact that the Employer may have acknowledged its obligations arising from its statutory obligations to an ex-employee in a separate document which may be in the form of an acknowledgment of debt does not detract from the fact that what is acknowledged to be owing are the terminal benefits.* The employee should not go forum shopping to the High Court or Magistrates Court seeking to sue on an acknowledgment of debt which in essence will be a case for enforcement of payment of terminal benefits. The relationship of Employer/Employee can loosely be said to continue after termination of employment as envisaged in s 13(1) of the Labour Act but only for the purposes of giving effect to or enforcement of payment of terminal benefits." at p 202 C-H [Emphasis added]

[35] I am persuaded to conclude that this case is on all fours with the *Nyanzara* case for the reasons that follow. Although titled a '*declaratur*', it presents clearly to me that the applicant's claim is, in reality, for unpaid salaries and benefits which the respondent has failed to pay per the mutual employment termination agreement between the parties. Accepting as I must that as already settled in *Nyanzara* (*supra*), to the extent that the acknowledgment involves non-payment of salaries and benefits within the ambit of s13 of the Labour Act, then the non-payment of same is an unfair labour practice which must be dealt with in terms of the Labour Act.

[36] I am fortified in my view by the remarks of GARWE JA (as he then was) in *Nhari* v *Mugabe & Ors* 2020 (2) ZLR 1062 (S) to the effect that

> "[41] Section 13 of the Labour Act makes it clear that whenever any person's employment is terminated, such person shall be entitled to the wages and benefits due to him up to the time of such termination, including benefits with respect to outstanding

> vacation and notice period. An employer shall pay such benefits as soon as is reasonably practical and failure to do so shall constitute an unfair labour practice.
>
> [42] The procedure for dealing with an unfair labour practice is to be found in s 93 of the Labour Act. The unfair labour practice is handled by a labour officer who attempts conciliation. The officer may, by consent of the parties, refer the matter to arbitration or that failing, proceed in terms of s 93 (5) of the Labour Act.
>
> [43] The first three claims were therefore matters that should have been handled by a labour officer in terms of s 93. Clearly the High Court was correct in holding that it had no jurisdiction to deal with these three claims….." (at p1073 C-E)

[37] On the basis of these decisions, I reach the conclusion that the scope of the actual nature of the dispute in *casu* has already been definitively determined by this court and the Supreme Court in *Nyanzara* and *Nhari* cases (*supra*). In light of this conclusion, I am of the view that there is no benefit to be derived from granting leave in circumstances where the prospects of success in the main application are seemingly dim for want of jurisdiction. There is no use in clogging the High Court roll with a matter which should more properly be ventilated in the Labour Court.

[38] On a careful consideration of the circumstances of this case, I conclude that this would not be an appropriate matter for me to exercise my discretion and grant the applicant leave to sue. The request stands to be refused.

[39] On the issue of costs, it is trite that costs follow the outcome.

DISPOSITION

[40] In the result, I make the following order:-

1. The preliminary points be and are hereby dismissed.
2. The application for leave to sue be and is hereby dismissed with costs.

MUSHURE J: .....

Matsikidze Attorneys-At-Law, applicant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners