

DURATION GOLD LIMITED  
versus  
FAWCETT SECURITY OPERATIONS (PRIVATE) LIMITED  
and  
FORBES AND THOMPSON (BULAWAYO) (PRIVATE) LIMITED  
and  
THE MASTER OF THE HIGH COURT N.O.  
and  
THE REGISTRAR OF DEEDS, COMPANIES & INTELLECTUAL PROPERTY N.O.

HIGH COURT OF ZIMBABWE  
COMMERCIAL DIVISION  
MANZUNZU J  
HARARE, 6 & 10 February 2025

## **COURT APPLICATION**

*Adv. T W Nyamakura*, for the applicant  
*Adv. L Nkomo*, for the 1<sup>st</sup> respondent

## **MANZUNZU J**

## **INTRODUCTION**

This is a court application in which the applicant is seeking leave of the court to file opposing papers to an application for corporate rescue brought by the 1<sup>st</sup> respondent against the 2<sup>nd</sup> respondent in case number HCHC 276/24. The application is opposed by the 1<sup>st</sup> respondent.

## **BACKGROUND**

- (1) The 1<sup>st</sup> respondent brought an application for corporate rescue in terms of section 124 (1) of the Insolvency Act, [Chapter 6:07] (the Act) against the 2<sup>nd</sup> respondent under case number HCHC 276/24. The application is pending before this court.
- (2) The applicant is not a party in HCHC 276/24.
- (3) The applicant intends to oppose the application in HCHC 276/24 as an “affected person” as contemplated in section 124 (3) of the Act.
- (4) The applicant says it is an affected person as defined in section 121 (1) (a) in relation to the 2<sup>nd</sup> respondent in that it is a shareholder and/or a creditor of the 2<sup>nd</sup> respondent, a position fiercely contested by the 1<sup>st</sup> respondent.

- (5) The 1<sup>st</sup> respondent refutes that the applicant is a shareholder and/or creditor of the 2<sup>nd</sup> respondent and has urged the court to dismiss the application with costs on a higher scale.

#### PRELIMINARY POINT

The only preliminary point raised by the 1<sup>st</sup> respondent is that the answering affidavit was filed out of time and must be struck out of the record and any reference to its contents in the heads of argument must be discarded. Mr *Nyamakura* conceded the answering affidavit was filed out of time but proceeded to make an oral application for condonation which was opposed. After hearing counsels on the issue of condonation I dismissed the application for condonation and gave my reasons extempore. The court also proceeded to uphold the preliminary point raised by the 1<sup>st</sup> respondent with the result that the answering affidavit was struck out and expunged from the record.

#### ISSUES

There are two issues which arise in this dispute.

- a) Whether the applicant is an affected person as contemplated in the Act?
- b) If so, whether leave should be granted for the applicant to file opposing papers in HCHC276/24?

#### ONUS

The onus to prove the issues on a balance of probabilities rests with the applicant. It is trite that he/she who avers must prove. See *Lasagne Investments (Pvt) Ltd & Ors v Highdon Investments (Pvt) Ltd & Ors* 2010 (2) ZLR 296 (H).

#### THE LAW

Section 124(3) of the Act confers a right on each “affected person” to participate in the hearing of an application filed in terms of section 124(1) of the Act for an order placing a company under supervision and commencing corporate rescue proceedings. In *Metallon Gold Zimbabwe (Pvt) Ltd & Ors v Shatirwa Investments (Pvt) Ltd & Ors* SC 107/21 at p. 23 of the cyclostyled judgment, the Supreme Court, per MALABA CJ, made the following apposite remarks about who an affected person is:

“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.” It cannot be “any interested person” as alleged by the applicant.

Section 121(1) (a) of the Act defines “affected person” to mean, *inter alia*, a “shareholder” or “creditor” of the company.

The resolution of the application turns on the interpretation of the relevant provisions of the Insolvency Act and of the Companies and Other Business Entities Act [Chapter 24:31] on the meaning of “shareholder” and “creditor”.. A “shareholder” is simply a “member” of a company. The Insolvency Act defines the word “independent creditor” to mean a person who—

- (i) is a creditor of the company, including an employee of the company who is a creditor in terms of section 137(2); and
- (ii) is not an associate of the company, a director, or the practitioner, subject to subsection (2).

#### IS APPLICANT SHAREHOLDER OF THE 2<sup>ND</sup> RESPONDENT

In the hearing the applicant conceded was not a shareholder to the 2<sup>nd</sup> respondent.

#### IS APPLICANT A CREDITOR OF 2<sup>ND</sup> RESPONDENT

The applicant in a lengthy founding affidavit said was a significant creditor of the 2<sup>nd</sup> respondent in that it has funded and continues to fund the resuscitation plan of the 2<sup>nd</sup> respondent. The applicant said so far has invested in the 2<sup>nd</sup> respondent more than six million United States dollars.

The 1<sup>st</sup> respondent denies that the applicant is a creditor or independent creditor in the absence of proof. Even if there were proof that applicant is an independent creditor, the applicant was disqualified by virtue of being an associate of the 2<sup>nd</sup> respondent.

#### SUBMISSIONS

Mr *Nkomo* read into section 121 (1) (a) of the Act the words “independent creditor” and said the applicant is not an affected person in the capacity of an “independent creditor” of the 2<sup>nd</sup> respondent. “Independent creditor” has a narrow meaning than the ordinary grammatical

meaning of the word “creditor”. This is so because it excludes an associate of the company, a director, or the practitioner.

Mr *Nyamakura* urged the court not to read the word “creditor” with the qualification “independent”. This is because if that was the intention the words “independent creditor” would have been used in section 121 (1)(a).

## ANALYSIS

Section 121 (1)(a) of the Act is not ambiguous in its reading. It talks of creditor and not independent creditor. I am not persuaded that the word “creditor” was meant to mean “independent creditor.” An independent creditor is just a class of creditors as defined in the Act. This distinction is necessary because certain provisions of the Act recognize rights which are conferred upon independent creditors only.

The applicant made bald averments that it is a creditor of the 2<sup>nd</sup> respondent. Mr *Nyamakura* argued that that was sufficient because this was not a forum to prove its claim. While I accept that the applicant need not prove its claim, nevertheless, has a duty to show that it is a creditor. Mere bald assertions will not suffice. Instead of demonstrating that it was a creditor of the 2<sup>nd</sup> respondent, the applicant concentrated on how it will oppose the main application. The 2<sup>nd</sup> respondent did not list the applicant as a creditor when opposing the application in HCHC 276/24. It is unusual for a significant creditor who accounts more than 80% of the debts.

It is trite that the applicant’s case is made in the founding affidavit, see *Minister of Justice, Legal and Parliamentary Affairs v Muskwe & Ors SC 67/22*. The applicant failed to discharge the onus upon it on a balance of probabilities. While the 1<sup>st</sup> respondent asked for costs on a higher scale, I do not think such are warranted. Failure to prove one’s case does not convert to abuse of court process.

## DISPOSITION

The application be and is hereby dismissed with costs.

*Diza attorneys, applicant's legal practitioners*  
*Masamvu & Da Silva-Gustavo, 1<sup>st</sup> respondent's legal practitioners*