

ZIMASCO (PRIVATE) LIMITED
(For a Provisional Order placing it under judicial management
and for the appointment of a Provisional Judicial Manager)

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 23 December 2015, 29 December 2015 and 13 January 2016

A Mugandiwa, for the applicant
Miss D Ndawana and Mr H Mutasa, for intervening parties

CHITAPI J: This application was set down as part of several other matters enrolled on the unopposed roll of 23 December, 2015. I had read through the application the previous day. There was no indication at all prior to the matter being called in court that there was any interested party who would seek to be heard other than the applicant. When the matter was called, however, Mr *Mugandiwa* for the applicant submitted that he had been served with a notice of opposition which had been filed in the morning. A copy of the notice of opposition was not in the record. Miss *Ndawana* then rose from the bar and advised that she represented four banks namely, MBCA Bank Limited, Nedbank Limited, Stanbic Bank and Central Africa Building Society (respondents) who intended to intervene in the application. She submitted that owing to the fact that the so called respondents had only come to know of the application by chance and upon a perusal of the court roll, her principal Mrs Brighton, had only been able to draft opposing papers hurriedly and the same time had been signed in the morning of the hearing date and filed. She applied to hand over a copy of the filed notice of opposition with opposing papers. I allowed Miss *Ndawana* to hand over the opposing papers across the bar. Mr *Mugandiwa* then requested that the matter be deferred to the end of the roll to enable him and Miss *Ndawana* to discuss and reflect on their positions. I granted the request and the matter was stood down to the end of the roll.

On resumption of the hearing, it turned out that counsel had not settled the matter. Mr *Mugandiwa* was not persuaded to have the matter postponed because in his submission, the notice of opposition had been improperly filed in that the opposition was premature. He argued

that the respondents had no right to file any opposing papers prior to the granting of the order. As such, so Mr *Mugandiwa* argued further, the respondents had no *locus standi* to appear before the court nor be heard. He further submitted that the respondents were creditors in regard to which there had been no service of the application. The respondents could only be properly before the court and be heard after service of the provisional order like every other interested party (i.e. assuming that the court did grant the provisional order).

I asked Miss *Ndawana* to address me on the propriety of filing opposing papers prior to the grant of the provisional order and whether the respondents had *locus standi* to oppose the application at this stage. She submitted that there was nothing in the rules of court nor the Companies Act which precluded an interested party from intervening in the application and that the respondents had *locus standi* to be heard at this juncture. In answer to my question whether or not s 301 (2) of the Companies Act should not be treated as granting interested parties the right to be heard after the grant of a provisional order of judicial management, she responded that the section provided for or entitled interested parties as therein listed to apply for a variation or discharge of the provisional order at any time after the grant of a provisional order. She was however insistent that it was permissible for an interested party to intervene before the provisional order had been granted. In her understanding of s 301 (2), the section did not debar an interested party from intervening prior to the granting of the order. In other words I understood her to be arguing that whilst s 301 (2) was permissive as granting rights to interested parties therein to apply to court to vary or discharge the provisional order at any time, the section was however not prohibitive of interested parties who may wish to oppose an application for the granting of the provisional order.

As it became apparent that the issue of whether or not an interested party could oppose an application for a provisional order of judicial management before it was granted, I directed that the parties' legal practitioners should prepare and file heads of argument to further ventilate their opposed positions. I then postponed the matter to 29 December, 2015 to allow for the preparation and filing of heads of argument.

I directed further that the parties' legal practitioners should appear in chambers on the same date to speak to their heads of argument. The legal practitioners duly filed their heads of argument and appeared before me in chambers with representatives of their clients. Miss

Ndawana was now deputized by Mr *Mutasa* her principal. The arguments presented were sustained and I wish to commend both legal practitioners for having put their best endeavors in preparing the heads of argument at a time that their respective firms were closed for the holiday.

In his heads of argument, Mr *Mugandiwa* further addressed the merits of the application in addition to the legal issue of *locus standi*. Mr *Mugandiwa* argued that even if the court was to rule that the respondents' notice of opposition was properly before the court and that the respondents had *locus standi* to intervene at this stage, the court should find that the opposition was not sufficient in its substance, to defeat the application and that the applicant should be found to have made its case for the grant of a provisional order of judicial management on a balance of probabilities. I enquired of Mr *Mutasa* as to what his position was. He submitted that it made practical sense and logic for the court if it ruled that the respondents were properly before the court, to decide the application taking into account the opposing affidavit rather than refer the matter to the opposed roll. I agreed with counsel for the parties that if I ruled in favour of the respondents on the points in *limine* I would adopt a procedure akin to what obtains with urgent chamber applications whereby the respondent files opposing papers and is heard and where the opposition is dismissed, a provisional order is nonetheless issued with the respondent being afforded another opportunity to oppose confirmation of the provisional order. Mr *Mutasa* then applied to withdraw the respondents' prayer in para 16.1 which read:

“16. The lender Banks accordingly seek an order that:

16.1 The matter be referred to the opposed roll and lender Banks be entitled to amplify and supplement its (sic) papers.”

Paragraph 16.1 was duly deleted.

The issues which arise for determination are therefore namely:

- (i) Whether or not an interested party can intervene and be heard in opposition of an application for provisional judicial management before a court determines whether or not to grant the provisional order or the court should simply determine the application on the basis of the applicant's papers.
- (ii) Whether or not a case for the grant of a provisional judicial management order has been made out by the applicant on the papers taking into account the notice of opposition or without taking into account the notice of opposition should I hold that

interested parties cannot intervene in the application prior to the granting of the order and as may be directed in the order.

I deal with the issues in turn;

Locus standi of the respondent banks to Intervene

To adequately address this issue, it is necessary to consider the relevant legislations governing applications for judicial management.

Judicial Management is a process provided for under ss 299, 300 and of the Companies Act [*Chapter 24:03*]. The sections read as follows:

Judicial Management instead of Winding up

299 Circumstances in which provisional judicial management order may be obtained

- (1) Subject to section three hundred, the court may -
 - (a) on an application made to it for such an order by any person who would be entitled to apply for the winding up of the company, grant a provisional judicial management order; or
 - (b) On an application being made to it for the winding up of the company, grant instead a provisional judicial management order.
- (2) Before an application referred to in para (a) of subsection 1 is filed with the court, a copy of the application including supporting affidavits and other documents, shall be lodged with the Master who may report to the court on any circumstances which appear to him to justify the court in postponing or dismissing the application, and in such event the Master shall transmit a copy his report to the applicant.

300 Requirements for provisional judicial management order

The court may grant a provisional judicial management order in respect of a company –

- (a) on an application referred to in para (a) of subs (1) of *section two hundred and twenty nine* if it appears to the court-
 - (i) that by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and

- (ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and
- (iii) that it would be just and equitable to do so; or
- (b) on an application referred to in para (b) of subs (1) of *section two hundred and ninety-nine*, if it appears to the court that –
 - (i) if the company is placed under judicial management, the grounds for its winding up may be removed and that it will become a successful concern; and
 - (ii) that it would be just and equitable to do so.

301 Contents of provisional judicial management order

- (i) A provisional judicial management order shall contain
 - (a) the date of the return day, which shall not be less than sixty days from the date of the grant of the provisional judicial management order; and
 - (b) directions that the company named therein shall be under the management, subject to the supervision of the court of a provisional judicial manager appointed in terms of *section three hundred and two*, and that any other person vested with the management of the company's affairs shall from the date of the making of the order be divested thereof; and
 - (c) such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company to raise money in anyway without the authority of shareholders as the court may consider necessary; and may contain directions that while the company is under judicial management, all actions and proceedings and the execution of writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court.
- (2) The court or a judge may at any time and in any manner, on the application of a creditor, a member, the provisional judicial manager, the Master or any person who would have been entitled to apply for the provisional judicial management

order concerned, vary the terms of a provisional judicial management order including the date of the return day, or discharge it.

Upon a proper reading of s 301 (2) of the companies, it is clear that its application is ex-post facto the granting of the provisional order. The provisions of that section therefore should be read and understood within the context that any interested party as therein listed may anticipate the return date of the provisional order and apply to have its terms varied or to have the provisional order itself discharged. The section does not contemplate the present scenario where an interested party seeks to oppose the application for the grant of a provisional judicial management order.

In s 2 of the Companies Act, the word court is defined as, “court”, in relation to any company, means the High Court, and in relation to any offence against this Act, includes the magistrates court having jurisdiction in respect of that offence. Drawing from the interpretation section and reading the same with s 299, an application for a provisional judicial management order is therefore a High Court application. High court applications are as correctly submitted by Mr *Mutasa* in his heads of argument, governed by s 226(1) (a) of the High Court Rules which reads as follows :

“26 Nature of applications

- (1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made-
 - (a) as a court application, that is to say, in writing to the court on notice to all interested parties; or
 - (b) as a chamber application, that is to say, in writing to a judge.”

Relying on r 226(1)(a), Mr *Mutasa* submitted that there was need for the applicant to have complied with the rule and given notice to interested parties. When I asked how notice of the present application should have been given and who the interested parties were, he could not commit to a firm answer and suggested that had he drawn up the application he would have directed it to the Registrar, the Master, the company (applicant) and all interested parties. When I asked him how the interested parties would be served, Mr *Mutasa* responded that the court roll would bear the citation of the parties and thus interested parties would know that they were party to the proceedings. I found Mr *Mutasa*'s submissions not helpful in addressing the problem he

had raised relating to service of a court application on all interested parties in a matter such as the one in *casu*.

In the courts' view and as admitted by counsel there would appear to be no specific rules which govern the procedure to be followed with regards court applications for a provisional order of judicial management. Although, s 2 of the Companies (Winding Up) Rules, 1972 RGN 841 of 1972 provides that, "the rules shall apply to all proceedings in every winding up and every judicial management", a reading of the rules shows that they only deal with petitions for the winding up of a company under the relevant section of the Companies Act. It would appear that in so far as the said rules are concerned, they would be applicable or be relevant to judicial management where an application is brought before the court in terms of s 299 (1) (b) of the Companies Act for the winding up of a company but the court grants a provisional order of judicial management instead. It does not appear that the rules would apply in circumstances envisaged in s 299 (1) (a) where an application is brought to court for the grant of a provisional order of judicial management as opposed to a winding up order.

An examination of both ss 299 (1) (a) and 300 shows that upon an application being made in terms thereof, the court is enjoined to grant a provisional order. The provisional order if granted should contain or deal with the matters contained in s 301(1) of the Companies Act. Turning to the High Court rules, r 240, provides as follows:

"240 Granting of order

- (1) At the conclusion of the hearing or thereafter, the court may refuse or may grant the order applied for, including a provisional order, or any variation of such order or provisional order, whether or not general or other relief has been asked for, and may make such order as to costs as it thinks fit.
- (2) Where the court grants a provisional order under subrule (1) r 247 shall apply *mutatis mutandis*, to the provisional order as though it were granted following a chamber application."

From the above discourse, the conclusions to be drawn are as follows:

- (i) In terms s 299 of the Companies Act, the filing of a court application for the grant of a provisional judicial management order is preceded by service of the intended application upon the Master. It is a peremptory requirement that the Master is served with the application together with any supporting affidavits and documents which the applicant seeks to rely upon to move the court to grant the order.

- (ii) The section does not require the applicant to serve or give notice of the application prior to making it upon any other party except the Master. The Master after service of the application upon him is expected if not required to go through the application and report to the court “on any circumstances which appear to him to justify the court in postponing or dismissing the application.” The Master is required to then deliver a report where he has prepared one to the applicant. The Master does not have to prepare a report where he does not identify any circumstance which would justify the court to postpone or dismiss the application. The previous practice whereby the Master filed a report supporting or agreeing with the relief sought is not a legal requirement. The Master is required to prepare a report at his election where he, in his opinion which should be backed by facts supporting his view, he believes that the application ought not to be granted i.e. it should be dismissed or postponed.
- (iii) The application is made *Ex-Parte*. No respondents are cited. The Master is not a respondent but the law requires that he be served for the obvious reason that his position is very central to the process, more particularly in that in terms of ss 302, 304 and 305 of the Companies Act, the Master upon the grant of a provisional judicial management order takes custody of the company’s property until the appointment and assumption of duty by the provisional judicial manager, convenes separate meetings of creditor, members and debenture holders and prepares a report to which the court must have regard on considering the confirmation or discharge of the provisional order. The Master oversees the process of judicial management by the judicial manager.
- (iii) The application differs from the normal court application envisaged in s 226 (1) in that in the practice of this court, interested parties envisaged in s 226 (1) (a) have invariably been named respondents. In court applications for a provisional judicial management order, the applicant applies for a provisional order as opposed to a final order. Rule 247 of the High rules is the relevant rule to be followed in applications as the present one and in particular subrule (3).

- (iv) An application made in terms of s 299 (1) of the Companies Act is therefore not made on notice to any other interested person other than to the Master. Interested or affected persons are given notice *ex post facto* the grant of the provisional order. The logic behind the giving of notice after the grant of a provisional is that the company or person applying for the provisional order is given the opportunity to make out a case to the satisfaction of the court that cumulatively, the matters referred to in s 300 of the Companies Act have been proven on a balance of probabilities.

Once the court is so satisfied, it issues a provisional order which *inter-alia* calls upon all and not only a selected group of interested parties to oppose the confirmation of the provisional order which will have been issued without hearing them. The court will give appropriate directives as to how service of its order will be published and also the dates, time and place when it will hear interested parties as well as the date by which interested parties should have filed opposing papers. This allows for an orderly procedure and process. To hear any interested party who may have come to know about the making of the application by chance, and to take into account what such interested person may have to say would amount to an undue preference to the exclusion of other interested parties who would not have become aware of the application. A holistic and orderly process can therefore only be achieved by not allowing opposition to be filed piece meal.

- (v) Section 301 (2) was deliberately inserted to ensure that there is no undue prejudice which an interested party may suffer if it were to wait for the return date. The provisions of that section allow for creditors, shareholders, the provisional judicial manager, the Master or any person who is entitled to apply for a provisional judicial management order to anticipate the return date seeking a variation or discharge of the order. Where such an application has been made, “the court or a judge may at any time and in any manner..... vary or discharge the provisional order.”

The provisions of this section gives flexibility to the process. Whilst the application for a provisional judicial management order is made to the court, the variation of the same can be made by a judge, that is “sitting otherwise than in open court”. The judge or court is not bound to follow any laid down rule in dealing with such an application because the application is dealt with “in any manner” obviously as the justice of the matter may appear to the court or judge to be best served.

Turning to the “respondents” argument that there is nothing in the Companies Act or rules of court which stipulates that interested parties cannot be heard before the grant of the provisional order, I find the answer to that to be simply that, what the legislature has done is to provide that third or interested parties other than the Master be given leave to make representations after the grant of the provisional order including leave to anticipate the return date of the order. In the present matter, the respondents could have sought a variation or discharge of the provisional order (assuming they had waited to hear if it would be granted) immediately after it had been granted. The purpose of hearing a party who may be affected by an order is to ensure that such party is not prejudiced in its rights and interests. The rationale is based on the *audi alteram partem* rule. In the present case, the rights of affected parties are still protected because no final order is made before they are heard. The parties are given leave to approach the court or a judge by application at any time after the grant of the order which may affect them and seek its discharge or variation.

I have considered the following authorities which the respondents’ counsel has drawn my attention to as supporting the proposition that in this jurisdiction, in an *Ex- Parte* court application for the granting of a provisional order of judicial management, the approach of this court is that intervening respondents are heard before the determination of the application.

(a) *In Re Graphic Age Advertising HH 97/2008*

(b) *Zimbabwe Textil Workers Union v Merlin (Private) Limited t/a Merspin & Anor HB 194/2011*

(c) *Ellingbarn Trading Private Limited v Assistant Master of the High Court & Anor HB 82/13*

(d) *Millman, Nov Swartland Huis Meibildeeders (edms) BPK; Repfin Acceptances Ltd Intervening 1972 (1) SA 741.*

All the cited cases do not support the respondents' counsel proposition at all because the question did not arise for determination. In the *In Re Graphic Age Advertising* case, Bere J dismissed with costs on a punitive scale, an application by a resigned or ex-director of that company who had not been paid his share of the valuation worth of the company. Aggrieved by the late payment of his dues, he filed an application seeking to place the company under provisional judicial management. The remaining shareholder who was the applicant's erstwhile co-director resisted the application on the basis that since the aggrieved director had resigned, he could not apply on behalf of the company to place it into provisional judicial management. There was also a shareholder agreement in place which dealt with issues of dissolution of the parties relationship and the same agreement provided that disputes be determined through arbitration. The learned judge upheld the objections and also indicated *obiter dictum* that the applicant would in any event have failed to satisfy the requirements for the grant of the provisional order. The learned judge not having dealt with the merits of whether a case for provisional judicial management had been may be out, it cannot be said that he allowed the opposition to the granting of the order as having been properly before him. Further and in any event, the issue of the propriety of filing of opposing papers by intervening the respondents and their *locus standi* to argue in opposition to the issuance of a provisional order for judicial management did not arise for determination.

Equally inapplicable to the determination of the question before me are the other decisions of this court as cited above. The court in the said decisions was not required to determine the question before me. The cases are therefore clearly distinguishable. With regards the South African case of *Millman, N.O v Swartland Huis Meubileerders (EDMS)*; the court dealt with an application to place the respondent company under judicial management, not under provisional judicial management. It was not argued nor demonstrated that s 195 (2) (a) of the South Companies Act, 46 of 1926 was the same in wording as ss 299 and 300 of the Zimbabwe Companies Act. It is important that when counsel seeks to rely on decisions from other jurisdictions, they should satisfy themselves and the court that the authorities would properly relate to the subject matter before the court.

I was during the course of argument also referred to the Supreme Court case of *National Air Workers Union (2) Air Transport Union v Air Zimbabwe Holdings (Private) Limited & 2 Ors*

SC 14/2015, a judgment of Ziyambi JA. Mr *Mutasa* argued that the Supreme Court had entertained the matter which had come before the High Court as an application for a provisional judicial management order where opposition had been allowed to be argued prior to the grant of a provisional order. Quite to the contrary, in my reading of the decision, the High Court decision which the Supreme Court upheld on appeal pertained to a point in *limine* which the High Court had upheld, being that the Unions who were the applicants had not provided proof that they had been authorised by their membership to bring the application. The High Court had ruled that the applicants had not established their *locus standi* to mount the application. The issue of the propriety of interested parties to intervene in applications for a provisional judicial management order before it is granted did not come up for determination by the Supreme Court. Therefore the Supreme Court case to the extent that it did not deal with the issue or question before me does not provide me with guidance as a precedent on the point.

It remains very difficult and well-nigh impossible to have consistency in procedure in circumstances where the issue of whether or not in applications for a provisional judicial management order in terms of ss 299 and 300 of the Companies Act, an interested party may intervene prior to the granting of the provisional order depends on judicial pronouncements for its authority. This is made more complicated by the fact that there are no specific court rules regarding the procedure to be followed, with the Companies Act itself in s 299 providing that the application be served upon the Master only as a pre-requisite to its determination.

My determination on the point *in limine* is therefore that an application made in terms of s 299 (1) (a) of the Companies Act is brought *ExParte*. Opposition is not permitted at the initial hearing stage by the court but the Master upon whom the application must be served prior to its filing with the court in terms of s 299 (2), may report to court such circumstances which in his view might merit or justify the court having to postpone or dismiss the application. The notice of opposition purportedly filed by the respondents is not properly before the court, is expunged from the record and the application remains unopposed. I proceed to the second issue which is to determine the application without regard to the notice of opposition.

Mr *Mugandiwa* on behalf of the applicant submitted that his papers were in order and prayed for an order in terms of the draft provisional order on pp 57 and 58 of the application. In my view, it does not follow that because the application papers are in order in the sense that the

procedures have been followed, the court automatically grants the application. The application itself must satisfy the requirements for the grant of a provisional judicial management order as provided for in ss 299 and 300 of the Companies Act.

Firstly, I take notice that the Master was served with the application on 15 December, 2015. The Masters' office stamp bearing this date is franked on the application. The service on the Master is further evidenced by the certificate of service on p 61 of the application which reads that Moffat Chipungu, a clerk in the employ of Wintertons (applicants' legal practitioners) served the application on the Masters' office on 15 December, 2015. On the same date Mr *Mugandiwa* as noted on the certificate of service made personal enquiry of the clerk and satisfied himself of the said service. Mr *Mugandiwa* then signed the certificate.

The application was filed on 14 December, 2015 as evidenced by the Registrar's stamp. In terms of sequence the applicant first filed the application with the court on 14 December, 2015. Thereafter and on the following day, 15 December, 2015, the application was then lodged or served upon the Master.

Section 299 (2) of the Companies Act as already quoted herein before clearly outlines the procedure to be followed in bringing an application such as the present one to court. The provisions of the section which are clear and unambiguous provide for the steps which the applicant must take i.e:

- (i) The applicant prepares the application which must include a supporting affidavit and other documents (if any) which are relied upon.
- (ii) The applicant should lodge the application with the Master who is then afforded an opportunity if he so wishes to prepare a report on any circumstances which may justify the court in postponing or dismissing the application. If he prepares such a report he provides the court with the report and transmits a copy to the applicant.
- (iii) The applicant then files the application with the court thereafter.

The provisions of s 299 (2) regarding procedure for filing an application of this nature which derive from s 299 (1) (a) are peremptory. The court has no power to vary the provisions of the Act nor to condone the non-compliance with the same. I have tried to find a provision in the Companies Act in terms of which I can derive authority to condone the error of the applicant in

proceeding to file the application with the court before first serving or lodging the same with the Master in breach of s 299 (2). I did not find any such provision. This is not a matter of an ordinary court application brought in terms of the rules of this court wherein condonation for a failure to comply with the rules can on application by the party in breach and on good cause shown be condoned. It is a legislative issue and the provisions of the legislation must be followed to letter. The applicant's failure to comply with the peremptory provisions of s 299 (2) therefore invalidates its application. I will not therefore deal with the merits of the application. The applicant if advised can recommence its application afresh and follow the provisions of the Act.

In the result I make the following order:

1. The purported notice of opposition filed by the 4 intervening banks seeking to be heard as the respondents is improperly before the court and is accordingly expunged from the record.
2. The 4 intervening banks have no *locus standi* to oppose or be heard in opposition in the determination of the application by the applicant company for its placement under provisional judicial management. The intervener's rights to oppose are only exercisable in terms of s 301 (2) of the Companies Act.
3. The applicants' application for a provisional judicial management order is hereby dismissed for non-compliance with s 299 (2) of the Companies Act on the sequence of bringing such an application to court.
4. There be no order as to costs.

Wintertons, applicant's legal practitioners
Gill, Godlonton & Gerrans, for Intervening Parties