BALASORE ALLOYS LTD
(Incorporated in the Republic of India with
Registration No. CIN: L127101OR1984PLCOO1354)
versus
ZIMBABWE ALLOYS LTD
(Incorporated in the Republic of Zimbabwe
Registration Number 43/50
and
ZIMBABWE ALLOYS CHROME (PVT) LTD
(Incorporated in the Republic of Zimbabwe
Registration Number 3386/09)
and
REGGIE FRANCIS SARUCHERA (Nominee Officio)
and
BULISA MBANO (Nominee Officio)

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 19 April 2018 & 25 April 2018

Urgent Chamber Application

Adv T Mpofu, for the applicant
Adv T Magwaliba, for the respondents

CHITAPI J: In this application, the applicant prays for the relief as set out in the provisional order which is couched as follows:

TERMS OF FINAL ORDER SOUGHT

1. That it be and is hereby declared that the Conditions Precedent set forth in Part 9 of the Scheme of Arrangement have not been complied with.
2. That it be and is hereby declared that Applicant's bid cannot be terminated on the basis that was accepted by the members and creditors of the Target Companies upon completion of

the relevant tender process and that there is no legal justification for any payment obligations to be triggered by the Applicant before the Conditions Precedent of the Scheme of Arrangement are satisfied.

3. That it be and is hereby declared that the purported notices to terminate and/or confirmation of termination of applicant's bid in the Scheme of Arrangement of 1st and 2nd respondents as reflected in letters to the applicant dated 26 March 2018 and 4 April 2018 respectively, are unlawful and contrary to the terms of the Scheme of Arrangement.
4. That 1st to 4th respondents' – jointly and severally the one paying the other to be absolved pay the costs of this application.

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of this Provisional Order the applicant is granted the following interim relief:

(a) That 3rd to 4th respondents – or one or other or both of them – be and are hereby interdicted, prohibited and restrained from taking any steps to cancel the Scheme of Arrangement and of engaging whether in Zimbabwe or elsewhere of any fresh bid or tender procedure and/or the entertainment of third parties to participate in a Scheme of Arrangement concerning 1st and 2nd respondents.

(b) That respondents, their agents, representatives and interested parties thereto be and are hereby interdicted from causing or motivating the publication of any information and material purporting to cancel applicant's interests and participation in the Scheme of Arrangement with 1st and 2nd respondents.

The material facts to this matter may be summarised as hereunder.

1. The applicant is a company incorporated in India whilst the first and second respondents are locally incorporated companies under judicial management. The first and second respondents were placed under provisional judicial management for an indefinite period by order of this court per MAFUSIRE J, under Case No. HC 5851/13 on 24 July 2013.
2. In terms of the order of provisional judicial management aforesaid, the court ordered the Master to specifically appoint Reggie Saruchera of Grant Thornton Camelsa who

is described in the order as a "suitable qualified and experienced person" to be the provisional judicial manager of the first and second respondents. The said provisional judicial manager was given powers and duties exercisable in terms of s 302 and 303 of the Companies Act, [*Chapter 24:03*]. Without being exhaustive of the powers which the judicial manager may exercise in terms of the provisions of the said sections, he or she is required to convene separate meetings of creditors, members and debenture holders of a company placed under judicial management. At the meetings, the provisional judicial manager is required to deal *inter alia* with the insolvency of the company and interrogate the prospects of bringing the company back to its feet if it is feasible to remould it back into a successful concern. The interested parties will during the process of provisional judicial management of the concerned company appoint the final judicial manager. A striking feature of the court order was that the specified provisional judicial manager, Reggie Saruchera was in the provisional judicial management order given powers to exercise the powers of the final judicial manager.

3. The final judicial manager exercises powers set out in s 306 of the Companies Act. The powers exercisable under the section include the take over from the provisional judicial manager the "management of the company and to comply with any direction or order of the court made in the final judicial management or its variation. The final judicial manager is required amongst other expectations to promote the interests of members and creditors of the company and to run the affairs of the company in a manner he considers most economical. The judicial manager's primary role therefore is to try and salvage the company out of the red. He or she takes or assumes the place of the directors and management of the company and carries out the statutory functions and obligations expected and required of the company.
4. It is in the light of the aforegoing albeit summarized background of the history of the matter and the truncated exposition of the duties of the judicial manager that the applicants' involvement in the affairs of the first respondent may be understood and appreciated.
5. The judicial manager convened the requisite meetings of the interested parties in the company. The interested parties passed a proposed scheme of arrangement aimed at

resuscitating the company. The scheme of arrangement was sanctioned by order of this court *per* ZHOU J on 20 December 2017.

6. The applicant became involved in the scheme of arrangement as an investor who would take over the first and second respondents' operations and rescue the companies from judicial management. It was envisaged that the applicant would inject an investment of monies in excess of $90 million.
7. A dispute has arisen in relation to the consummation of the relationship between the applicant and the first and second respondents as represented by the judicial manager. In short the judicial manager accuses the applicant of having failed to fulfil its undertakings and hence committed a breach of the terms of the scheme of arrangement or the contract of investment concluded by the parties.
8. I do not propose to interrogate the alleged breaches cited by the judicial manager. Suffice that they are denied by the applicant which takes the position that the delays in the consummation of the agreement and injection of funds are a result of bureaucratic and other hurdles which are not within the power of the applicant to provide or accelerate.
9. What has led to the filing of this urgent application according to the applicant is a letter written by the judicial manager to the applicant on 3 April, 2018 which reads in the main as follows; "major creditors and members of first respondent have resolved to terminate your (applicants) bid and invite other bidders. It is clear that Balasore has no capacity to execute on this transaction." On 6 April 2018 the applicant lodged this application claiming the relief sought in the draft provisional order in an endeavor to protect and safeguard its rights and interests which it perceived as being under threat by the conduct of the judicial manager through the contents of his letter of 3 April, 2018 aforesaid.
10. The respondents opposed the urgent application and filed a notice of opposition accompanied by an affidavit sworn to by the fourth respondent who stated therein that he is "duly authorised to represent the respondents in the matter." I make a comment here that the authority of the fourth respondent to represent the other cited respondents cannot be inferred and is not obvious in as much as the applicant impugns the fourth

respondent's *locus standi* in the founding affidavit. In fact, the applicant clearly challenges the authority and *locus standi* of the fourth respondent to style himself as the judicial manager when the judicial manager is supposed to be the third respondent in terms of the order of MAFUSIRE J, placing the first and second respondents under judicial management. In my view, it was incumbent under the circumstances for the fourth respondent to adduce evidence of how he came to be the judicial manager in place of the third respondent whom the court ordered the Master to appoint as such. The certificates of appointment issued by the Master, purporting to appoint the fourth respondent as judicial manager, they being in conflict with the order of this court as to who should be the liquidator cannot without explanation validate the appointment. It is worse so because the applicant has placed the appointment of the fourth respondent and his *locus standi* into issue.

11. The respondents' opposing affidavit raised preliminary issues. The first was that the applicant being a *peregrine* company should furnish security for costs prior to the hearing. Mr *Magwaliba* did not in addressing the preliminary objections motivate this point. I therefore need not deal with the issue. I assume that the issue was resolved by the parties or abandoned. Coupled with this point was the further point that the applicant needed to seek the leave of the court to sue the first and second respondents since they are under judicial management. The point was not advanced or motivated before me and I again assume that it was abandoned. I would in passing note however that MAFUSIRE J's order stayed applications, actions, writs, summons and other process against the applicant and ordered further that they should not be proceeded with without the leave of this court. I do not read the protection afforded by the order to relate to future proceedings. It would in any event be absurd and illogical to allow the judicial manager in conducting the affairs of the company with a view to changing its fortunes for the better to enter into legal relationships on behalf of the company but hide behind immunity when sued over issues arising from his or her actions as manager of the company. Though the matter has not been argued, I daresay that the protectionist provisions against the company placed under provisional judicial management were not intended to be futuristic in their effect but to arrest existing situations which

situations would otherwise worsen the viability of the company if process facing it was not arrested.

12. Mr *Magwaliba* argued that the application was not urgent firstly because, a prohibitory interdict could not be sought *ex post facto* the event. His argument as I understood it was that since the letter by the judicial manager indicated that a resolution had been made to terminate the applicants bid, the court could not interdict what had already been done. When l asked whether the resolution referred to was to hand and if l could have sight of it, Mr *Magwaliba* responded that the termination was a common cause fact. Mr *Mpofu* disagreed and referred me to paragraphs in the founding affidavit wherein the applicant was challenging the validity of any such resolution if any was made at all. Mr *Mpofu* further argued that the purported letter of termination referred to a termination of the applicants bid yet the parties were no longer at bidding stage as they had concluded a contract of investment under the scheme of arrangement. What could only be terminated therefore was the contract and not the applicant's bid. I agree.
13. Mr *Magwaliba* further argued that the nature of the order sought had the effect of interdicting the respondents from judicial access or entitlement to approach the court to sanction the termination. Mr *Mpofu* disagreed that the intention of the applicant in seeking the interdict was to stop the respondents from approaching the court for appropriate relief. I did not read the interim relief prayed for as having such effect. In any event I pointed out to the respondents' counsel that in urgent applications for a provisional order, the presiding judge is at large to determine the nature and content of the order to grant if he or she is persuaded that a case meriting protection has been made out.
14. I would not have composed a written judgment but for the need to call the attention of counsel to rule 246 (2) of the High Court Rules 1971. The rule provides as follows:

"**246 Consideration of Applications:**

1. A judge to whom papers are submitted in terms of rule 244 or 245 may –
   (a) require the applicant or the deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge require;

(b) require either party's legal practitioner to appear before him to present such further argument as the judge may require.

2. Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he shall grant a provisional order either in terms of the draft filed or as varied.

3. Before granting a provisional order a judge may require the applicant to give security for any loss or damage which may be caused by the order and may order such additional evidence or information to be given as he thinks fit.

Urgent applications are provided for under rule 244 and non-urgent applications under r 245. In *stricto sensu,* it is in the discretion of the judge to require parties, any deponents to affidavits or any person who may assist in resolving an application to appear before the judge to [provide further information as the judge may require.

Obviously, where parties are represented and the judge requires further information on papers which have been prepared by the legal practitioner, such legal practitioner is the point person whom the judge will direct that he or she appears with the person from whom the judge may require additional information in chambers for clarification. In order to conform to the *audi alteram partem* rule, where an application is opposed, the other party or that party's legal practitioner is also directed to attend. The judge may require only legal practitioners to appear and present further argument on their papers or on such matters which may arise from the application as the judge may require. Appearance by a party before a judge before whom a chamber application has been placed in terms of rr 244 or 245 is not an entrenched a right. It is at the judge's invitation and the judge in practice does this by setting down the application for hearing in chambers. In dealing with an urgent chamber application for example, the judge may rule that it is not urgent without hearing the parties. Parties can however request for reasons for the decision and to be heard on that issue. I leave it at that to avoid a digress from the issues requiring determination in this application.

The critical point I need to deal with as indicated herein before is to ventilate r 246 (2) which obliges the judge in applications for a provisional order to grant a provisional order as sought in the draft order or as varied where the judge is satisfied that the "papers establish a *prima facie* case." In my judgment, the first issue for the judge to determine when the application is placed before him or her in terms of r 244 is whether or not the matter is urgent. The test for urgency is well settled, tried and tested and must now amount to a tired one to repeat. I do not wish to repeat

it save to refer to the celebrated case of *Kuvarega* v *Registrar General & Anor*. 1998 (1) ZLR 188 (H) whose principles therein set out have consistently been followed by our courts.

In South Africa, the approach is not dissimilar. The applicant in an urgent application is required to set out the factors and circumstances which in the belief of the applicant renders the matter urgent. In addition the applicant should give reasons for believing that he or she cannot obtain substantial redress at a hearing in due course. See *Salt & Another* v *Smith* 19991 (2) SA 186.

The dispensation with rules and established procedures ordinarily governing application procedure by bringing an application on the urgent roll must be necessitated by the urgency involved. Urgency itself cannot be defined with preciseness or exactitude. It is a matter of degree. In general I would believe that every matter is urgent to the affected litigant. The question therefore must be, "Is the matter so desperately urgent as to require immediate redress which will not be realised if the matter is heard in due time?" Urgent applications not only give an unfair advantage to the applicant who gets his or her case attended to ahead of other earlier filed and pending deserving cases, but they also reduce the time for service and preparation by the other party to oppose the application. The procedure should be sparingly used and not be abused. Unfortunately many a time, the special window provided for parties to come to court on an urgent basis seems to have become the preferred route rather than the exception even where it is clear that a matter can wait to be determined in due course.

Having determined that a matter is urgent, the next stage is for the judge to determine whether or not a *prima facie* case has been made out on the papers. There is a lot of jurisprudence and case law on what constitutes a *prima facie* case. A *prima facie* case in my view can be holistically described as one that does not merit an absolution from the instance. See *Hualong Construction (Pvt) Ltd* ats *MC Plumbing (Private) Limited* HH 88/15; *Mafusire* v *Greyling & Anor* 2010 ZWHHC 173; *Madombwe* v *Rimbi & Anor* 2015 ZWHCC 354; *Osupale* v *Bank of Botswana* 1997 BLR 1356; *Barend van Wyk* v *Tarcon (Private) Limited* SC 49/14.

In determining whether a *prima facie* case is established the focus should not be to determine whether the applicant has provided evidence to establish what the applicant must finally establish. The approach should be to determine whether the applicant has placed evidence before the judge from which a court properly directed and applying its mind to the evidence could or

might find for the applicant. The standard of proof required to establish a *prima facie* case is much lower than proof on a balance of probabilities. In other words, the judge only needs to be satisfied that there is a case made by the applicant which merits referring to the court for further and fuller argument so that a final determination is made by the court which still hears full argument. It is seldom though that the urgency of a matter can be divorced from a finding on the existence of a *prima facie* case.

The worrying tendency which I have noted in this court is that judges allow parties to argue beyond what is required to establish a *prima facie* case. In the process, urgent applications sometimes take a half or full day because the judge allows the parties to argue *ad infinitum* as if the applicant must establish anything other than a *prima facie* case. The procedure for dealing with urgent applications in my view should be for the applicant on his or her papers to satisfy the judge on the existence of a *prima facie* case. The judge once satisfied as aforesaid must as a matter of course grant the temporary relief as prayed for or on such terms as the judge considers just and equitable. All affected persons and the litigants may in terms of r 247 and as more fully as set out in form 29 C anticipate the return date and arrange for an urgent set down of the case and present full argument for the discharge or variation of the provisional order.

In *casu* I was satisfied that the applicant had established a *prima facie* case. The applicant put in issue the authority and *locus standi* of the fourth applicant to act as judicial manager. The applicant also raised issues pertaining to the validity of the purported termination of the applicant's bid yet, the bid stage had long been consummated and a contractual relationship established. The parties were agreed that the threat to the financial interests of a company was a recognisable ground for urgency. I was referred to the judgment of SMITH J in *Silvers Trucks (Pvt) Ltd* v *Director of Customs & Excise & Anor* 1999 (1) ZLR 490 (H). I respectfully hold that whether or not a threat to commercial or financial interests of an individual or juristic person grounds urgency is situational and not a rule of thumb. The discretion to find urgency where commercial or financial interests are involved should be informed by a consideration of all the facts and circumstances of the case before the court. Ultimately the question must revolve on whether the applicant cannot get relief in due course if the matter is not determined on the urgent roll. The cancellation of a multi-million dollar contract arguably adversely affects a company's financial interests. Additionally the applicant put forward arguments tending to show that the applicant was not to

blame for delays in exporting the investment amounts into Zimbabwe. This placed in issue the validity of the judicial managers justification to cancel the relationship These and others factors were matters which persuaded me to hold the matter as urgent and to find that the interdict sought holding extant the status *quo ante* the purported termination letter be restored and preserved.

In the circumstances I resolved to grant the provisional order subject to a variation in para (a) and (b) of the interim relief granted by the addition after the words “Respondents” at the end of the paragraphs, of the words “without an order of this court.”

Honey & Blankenberg, applicant’s legal practitioners
Atherstone & Cook, respondents’ legal practitioners