ZIMBABWE ALLOYS LIMITED
and
ZIMBABWE ALLOYS CHROME (PRIVATE) LIMITED
versus
BALASORE ALLOYS LIMITED
and
BENSCORE INVESTMENTS (PRIVATE) LIMITED
and
ROSEMARKET (PRIVATE) LIMITED
and
COMETAL TRUST
and
COMETAL SA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 25 June & 11 September 2019

Opposed application

D Ochieng, for applicants
T Mpofu, for respondents

TAGU J: The applicants are seeking the cancellation of a court –sanctioned scheme of arrangement citing a material breach of a fundamental term by the first respondent which breach the applicants say strike at the root of the entire scheme and justifies the grant of the relief sought. The reliefs sought are that the Scheme of Arrangement sanctioned by the Honourable Mr Justice ZHOU on the 20th December 2017 in Case Number HC 5670/17 be and is hereby set aside, the Judicial Manager be and is hereby authorized to proceed to engage other interested parties that wish to invest in the applicants and that the first respondent pays the cost of suit.

The brief facts are that in January 2014 the first applicant, Zimbabwe Alloys Limited ("ZAL") and the second applicant Zimbabwe Alloys Chrome (Private) Limited ("ZAL") were placed under provisional Judicial Management due to operational challenges which the group was facing that made continued operations untenable. The operational challenges were attributed to the closure of all the furnaces, poor commodity prices and escalating costs. The applicants were unable

to settle amounts owed to various creditors amounting to US$60 million (Sixty million United States Dollars.) To resuscitate their operations and settle existing debts, the applicants required significant recapitalization.

At a meeting of creditors and members held in November 2013, prior to the applicants being placed under final Judicial Management, the creditors and members agreed that the envisaged recapitalization could only be achieved by the introduction of a new investor to inject fresh capital and kick-start operations.

Two (2) bids were received and following an evaluation of the bids, the first respondent was selected as the preferred bidder on the 12th of April 2017, to revive the group and ultimately negotiate settlement terms with creditors.

In anticipation of the conclusion of the proposed investment by the first respondent, the members and creditors of the applicants unanimously agreed that the Judicial Manager would proceed by way of a Scheme of Arrangement in terms of section 191 of the Companies Act [*Chapter 24.03*].

A Scheme of arrangement was duly concluded between the members and creditors of the applicants, premised on the investment proposal from the first respondent. The Scheme of Arrangement was duly sanctioned by this Honourable Court on the 20th of December 2017. The court order by JUSTICE ZHOU reads as follows-

"IT IS ORDERED THAT:

1. The Scheme of arrangement which was approved by the requisite margins, at the meeting of the members and creditors of Zimbabwe Alloys Limited and Zimbabwe Alloys Chrome Private Limited held on Wednesday 6 December 2017 be and is hereby sanctioned in terms of section 191 (2) of the Companies Act (Chapter 24. 03).
2. The aforesaid Scheme shall be binging on all the members and creditors of the applicant.
3. That the Scheme shall become effective on the date on which applicants register with the Registrar of Companies ("the Registrar") copies of this order and the Scheme Circular in terms of section 191 (2) of the Companies Act, which is expected to be 3b January 2018 or such later date as the aforesaid documents may be so registered with the Registrar.
4. There is no order as to costs."

The Scheme of Arrangement was duly registered with the Registrar of Companies on the 29th March 2018 in terms of s 191 (3) of the Companies Act. In terms of the implementation clause, section 10 (7) of the Scheme document sanctioned by the Honourable Court, the first respondent was required to make an initial payment of US$10 697 833.00 (Ten million six hundred and ninety

–seven thousand eight hundred and thirty three United States Dollars) together with the transaction costs to the Judicial Manager's Trust Account within 30 days from the date when a copy of the High Court Order sanctioning the Scheme and the Scheme document were lodged with the Registrar of Companies for registration. There was therefore no condition precedent.

In terms of the Implementation Clause, s 10 (8), 10 (9) and 10(10) of the Scheme document, upon receipt of this payment, the Judicial Manager would then make the necessary payments to Creditors and issue share certificates to the first respondent or its nominee to be held in escrow pending receipt of the full investment amount. The Judicial Manager would then facilitate handover and take –over of the company to the first respondent upon receiving this initial payment as per the implementation clause in the Scheme document.

Regrettably the first respondent failed to make the initial payment of US$10 697 833.00 which was due on the 16th of March 2018. In fact on the 12th March 2018 the first respondent in apparent breach of the terms of the Scheme wrote to the Judicial Manager committing itself to new payment terms. The new proposed terms were accepted by the major creditors on the 19th March 2018 based on the fact that the first respondent would take action to secure the required exchange control approval.

Despite submitting new payment terms, the first respondent failed to make payment based on its own revised terms. As at the time of filing of this application, no payment had been received from the first respondent. In light of the first respondent's apparent failure to execute the transaction the Judicial Manager proceeded to terminate the first respondent Balasore Alloys Limited (BAL's) bid as directed by the major creditors and members. Citing this material breach of a fundamental term the applicants now seek the cancellation of Mr Justice Zhou's court –sanctioned Scheme of arrangement made on the 20th December 2017 in Case Number HC 5670/17 so that they can proceed to engage other interested parties that wish to invest in the applicants.

The first respondent raised some points *in limine*. The first point *in limine* is that the deponent to the founding affidavit Bulisa Mbano was not validly appointed as Judicial Manager and consequently cannot bring these proceedings. The other point *in limine* challenges the locus standi of the fourth respondent. Another point *in limine* was about the non-joinder of the creditors who mandated the application. The last point *in limine* is that there are material disputes of facts.

***LOCUS STANDI* OF THE APPLICANT'S DEPONENT**

In this case, a simple reading of ANNEXURE “A” to the founding affidavit confirms that a vacancy arose in the office of judicial manager following the resignation of Reggie Saruchera. Section 304 (5) of the Companies Act [*Chapter 24.03*] provides that such a vacancy must be filled by the Master in accordance with s 218(3); that is to say, by firstly seeking the agreement of the creditors and contributories. Annexure “A” confirms that there was such agreement to the appointment of the applicant’s deponent, and the first respondent does not dispute this,. It is thus most unhelpful and legally unsustainable for it to affect to challenge his authority. The Annexure “A”, a letter of appointment from the Master reads as follows-

> “**RE: ZIMBABWE ALLOYS CHROME (PVT) LTD AND ZIMBABWE ALLOYS LIMITED (UNDER JUDICIAL MANAGEMENT): CR 49/13**
> Pursuant to the resignation of **Mr R Saruchera** from his position as Judicial Manager of the above companies, and **Mr B P Mbano’s** acceptance to be appointed as the new Judicial Manager of the said companies, and regard being had to the fact that the shareholders holding at least 85% of the issued share capital of the companies and creditors holding at least 71,68% of the proved claims against the companies have so approved, I hereby accept **Mr R Saruchera’s** resignation with effect from 10 October 2016 and appoint **Mr B P Mbano** as the new Judicial Manager of the companies with effect from the same date.
> Please note that the bonds of security provided by Grant Thomton Camelsa in respect of **Mr R Saruchera** will be held to be the bonds of security for **Mr B P Mbano.**
> Also note that it is no longer necessary to convene meetings of creditors and contributories for the purpose of electing a new judicial manager, because the votes would be as reflected in the letters from the shareholders with at least 85% of the issued share capital and the creditors with at least 71,68% of the proved claims against the companies.
> Please ensure a proper handover and takeover of the companies between yourselves.”

In casu the first respondent itself accepted in Annexure “H” to the founding affidavit that the deponent is the judicial manager of both applicants. This court has in the past deplored the unfortunate practice of objecting to the locus standi of parties as if merely for the sake of doing so, even where it is known from previous dealings that the party speaks with the requisite authority: *Air Zimbabwe Corporation & Ors* v *ZIMRA* 2003 (2) ZLR 11 (H) at 16G. The first point *in limine* was not seriously taken and is dismissed.

LOCUS STANDI OF FOURTH RESPONDENT

The fourth respondent is cited as Cometal Trust. The first respondent complaints about this citation. However, I found no merit in the objection because Rules of this Honourable Court expressly allow the citation of the trustees by the name of the trust rather than by their individual

names. For this contention I refer to Order 2A, rule 8 as read with r7. The second point *in limine* is summarily dismissed.

NON-JOINDER OF CREDITORS

The first respondent complains about the non-joinder of the very creditors who mandated the application and wish fervently for the relief sought to be granted: See Annexure "P" to the founding affidavit. Not only does the first respondent not dispute that the creditors are the very people who mandated this application. The legal position is that this court may determine the rights and liabilities as between the parties before it; and it is upon those rights that the whole issue turns. See *Moyo* v *Ncube &Ors* 2008 (2) ZLR 333 (H) at 335G-336A. See also order 13 r 87 of the Rules of this Honourable Court where the rules say-

> " **87. Misjoinder or nonjoinder of parties**
> (1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

I therefore found no merit in this point *in limine* and I accordingly dismiss it as well.

MATERIAL DISPUTE OF FACTS

The long and short of it is that the first respondent alleged that there are material disputes of facts. What the court found puzzling about this suggestion is that the circumstances under which Mr Mbano was appointed presents disputes of fact. Yet as I stated above the letter from the Master clearly states the circumstances under which Mr Mbano was appointed, being that there was a vacancy and the Master was mandated to fill that vacancy. Also a dispute was raised about the claims and or title held by applicants. The other issue is whether there was any breach. I am of the view that these are some of the issue this court has to determine, being the very reason why this application has been brought up. There are therefore no material disputes of facts which this court cannot resolve without the leading of evidence. I will dismiss the last point *in limine*.

AD MERITS

In the present case the Scheme of Arrangement that the applicants seek to be set aside was unanimously approved at a scheme meeting convened by order of this Honourable court. It was thereafter sanctioned by the court in the prescribed manner and, consequent upon the grant of such

sanction, has the effect of a contract binding on all concerned. The applicants now allege that there was a breach by the first respondent of the material term of the Scheme of Arrangement.

In the case of *Parker* v *WGB Kingsley & Co (Pvt) Ltd* 1985 (1) ZLR 380 (HC) at 386C it was held that-

> "this court would be able to set aside the scheme of Arrangement but only if there [has] been a material breach of the terms thereof and there [is] no other remedy available to the aggrieved party to protect his right."

I gave a brief summation of the facts of this matter at the beginning of this judgment and I need not repeat them. The contract in this case was very clear. In terms of the Implementation clause s 10(7) of the Scheme document sanctioned by this Honourable Court, the first respondent was required to make an initial payment of US$10 697 833.00 together with the transaction costs to the Judicial Manager's Trust Account within 30 days from the date when a copy of the High Court Order sanctioning the scheme and the scheme document were lodged with the Registrar of Companies for registration. The scheme document and the High Court Order were duly lodged with the Registrar of Companies on the 14th February 2018 as per Annexure "G1". Therefore logically the initial payment was due on or before the 16th of March 2018. This payment from my reading of the Scheme document was not subject to the fulfilment of any condition precedent. The first respondent was simply required to make the payment upon receiving confirmation from the Judicial Manager that the scheme document and Court Order sanctioning the Scheme had been delivered to the Registrar of Companies. Regrettably to date the first respondent failed to make the initial payment of US$10 697 833.00 which was due on the 16th March 2018. It is not disputed that the first respondent then wrote to the Judicial Manager committing to new payment terms which were as follows-

1. "Payment of US$22.03 million by 30 March 2018 to creditors as part of the Equity injection;
2. Payment of US$23.3 million by 30 April 2018 to creditors as part of the Equity injection. And
3. Submission of the requisite comprehensive loan document required by the Exchange Control Authority by 30 April 2018, in respect of the debt component of US$45 million."

The new arrangement was accepted by major creditors on the 19th March 2018 based on the fact that the first respondent would take action to secure the required exchange control approval. Despite submitting new payment terms the first respondent failed to make payment

based on its own revised terms. As at the time of filling this application on the 24th of July 2018 no payment had been received from the first respondent. Further, the first respondent had not submitted the required comprehensive loan documents to the Reserve Bank of Zimbabwe which it had undertaken to submit by the 30th April 2018.

There can therefore be no doubt that the first respondent failed to-

1. Discharge the initial payment;
2. Disburse under its own revised payment terms and
3. Submit adequate information for Exchange Control Approval as required by the RBZ.

In light of the first respondent's apparent failure to execute the transactions, the Judicial Manager proceeded to terminate the first respondent's bid as directed by the major creditors and members as per minutes of the informal meeting of the Zim Alloys limited major creditors held at Grant Thornton on 19th March 2018 at 11AM. See Annexure ''I'' which reads in part as follows-

> "……
> Most creditors were not opposed to termination of the bid. Following much deliberation on the issue, the following resolutions were made;
> Resolution 1
> Balasore is to pay the first equity portion of US$22.03 million on or before 30 March 2018. Failing which, the Judicial Manager is authorized to immediately terminate the bid on 1 April 2018 and proceed with the cancellation of the Court Order sanctioning the Scheme of Arrangement.
> Resolution 2
> ………"

Having read the papers filed of record and hearing counsels it can safely be concluded that the Scheme of Arrangement between the members and creditors of the applicants was premised on the first respondent's investment. In light of the fact that the first respondent has failed to meet its obligations in terms of the Scheme, the members and creditors at a meeting held on 7 June 2018, authorized the Judicial Manager to proceed to apply to this Honourable Court for cancellation of the Scheme of Arrangement in respect of Balasore's investment in ZAC and ZAL. The members and creditors of ZAL and ZAC further instructed the Judicial Manager to identify other potential investors to revive the fortunes of the group. Am satisfied that the first respondent clearly has shown that it has no capacity to fulfil the terms of the Scheme of Arrangement despite having made various undertakings during the tender process. Consequently, the Scheme of Arrangement sanctioned by this Court on the 20th December 2017 has to be cancelled as per the

request of creditors and members. It is unfair for the first respondent to continue to play victim, mislead stakeholders, drag its feet and employ all sorts of delaying tactics at the prejudice of the applicants. The Judicial Manager's mandate is to revive the operations of the group. Since the first respondent's bid has already been terminated the Judicial Manager must be afforded an opportunity to engage other interested parties that wish to invest in the group. Accordingly the application is granted.

IT IS ORDERED THAT

1. The Scheme of Arrangement sanctioned by the Honourable Mr Justice Zhou on the 20th December 2017, in Case Number HC 5670/17, be and is hereby set aside.
2. The Judicial Manager is hereby authorized to proceed to engage other interested parties that wish to invest in the Applicants.
3. The 1st Respondent is ordered to pay the costs of suit.

Atherstone & Cook, applicants' legal practitioners
Honey & Blanckenberg, respondents' legal practitioners