GETBUCKS MICROFINANCE BANK LTD
versus
WILLEDIT INVESTMENTS [PVT] LTD [*Under corporate business rescue*]
and
BUDHAMA CHIKAMHI N.O.
and
THE MASTER OF THE HIGH COURT N.O.
and
RASAI CLEMENT NYABANDO
and
NEW WORLD CONSTRUCTION [PVT] LTD ***Case 1***

KNOWZ WANDALAND [PVT] LTD [*Under corporate business rescue*]
and
WILLEDIT INVESTMENTS [PVT] LTD [*Under corporate business rescue*]
and
WILLIAM MUKUVAPASI
and
EDITH MUKUVAPASI
versus
GETBUCKS MICROFINANCE BANK LTD
and
SHERIFF OF THE HIGH COURT N.O. ***Case 2***

MAFUSIRE J
HARARE, 29 January 2025

Date of judgment: 14 March 2025

Opposed application

W.T. Nyamakura, for applicant in ***Case 1***, being the first respondent in ***Case 2***.
S.A. Murondoti, for first and second respondents in ***Case 1***, and for applicants in ***Case 2***.
H. Muza, for fourth and fifth respondents in ***Case 1***.
No appearance for third respondent in ***Case 1***, or second respondent in ***Case 2***.

MAFUSIRE J

[1] The two cases above were consolidated and heard together. In ***Case 1***, the applicant, Getbucks Microfinance Bank Ltd ["***the applicant***"] being the second respondent in ***Case 2***, seeks the setting aside of a resolution placing under corporate rescue the first

respondent herein, Willedit Investments [Pvt] Ltd ["***the first respondent***" or "***Willedit Investments***"], being the second applicant under ***Case 2***. The applicant also seeks the removal of the second respondent herein, Budhama Chikamhi ["***the second respondent***" or "***Mr Chikamhi***"] as corporate rescue practitioner for the first respondent.

[] ***Case 2*** is the return day of a certain provisional order. It was issued by this court against the applicant and in favour of the first respondent and another company called Knowz Wandaland [Pvt] Ltd ["***Knowz Wandaland***"] which cited in that case as the second applicant. The couple known as William Mukuwapasi and Edith Mukuwapasi were cited in that case as third and fourth applicants respectively.

[] To avoid confusion, the protagonists shall be referred to simply as the applicant and respondents, or by their actual names or monikers as the context may demand.

[] In colloquial parlance, Willedit Investments and Knowz Wandaland are "sister" companies. They are "owned" by William and Edith Mukuwapasi, these being the sole or major shareholders and co-directors. Both companies own, or have a beneficial interest in an educational institution called Knowstics Academy ["***Knowstics Academy***" or "*t**he school***"]. Although ***Case 1*** was in respect of Willedit Investments and Mr Chikamhi only, at the various case management conferences, it was the understanding that the proceedings pertained to all the respondents.

[] The provisional order in ***Case 2*** flowed from an urgent chamber application against the present applicant. It stayed the execution of a provisional sentence the applicant had previously obtained in proceedings under the case reference number HCHC 752-23 collectively against Knowz Wandaland, Willedit Investments and the Mukuwapasis for, among other things, payment of the sum of US$131 589-39.

[] In another provisional sentence summons under HCHC 43-24, the present applicant had also obtained a provisional sentence for US$554 446-24 collectively against Willedit Investments and the Mukuwapasi.

[] In ***Case 1***, Willedit Investments, Mr Chikamhi, one Rasai Clement Nyabando, the fourth respondent herein, and an entity called New World Construction [Pvt] Ltd, the fifth respondent herein, have all opposed the applicant's claim. The fourth respondent alleges that he is employed by Willedit Investments and that by virtue of alleged arrear salaries owed to him, he is a creditor of the school. The fifth respondent alleges that it is equally a creditor by virtue of outstanding payments due to it for certain construction work done by it at the school.

[] Truncated, the background facts are these:

- Following the granting of the provisional sentences as aforesaid, the applicant went on to issue writs of execution.
- Movable and immovable properties belonging to the sister companies and the Mukuwapasis were attached.
- The sale in execution was scheduled for 23 August 2024.
- The Sheriff had given the notice for such attachment on 18 July 2024.
- On 19 July 2024 the Mukuwapasis passed a resolution, purportedly in terms of s 122[1] of the Insolvency Act [*Chapter 6:07*] ["***the Act***"], to place the companies under corporate business rescue.
- On 25 July 2024 the Mukuwapasis and their companies obtained a provisional order for a stay of execution.
- In ***Case 2***, the Mukuwapasis and their companies now want the provisional order confirmed.
- The applicant has not only vehemently opposed ***Case 2*** for the confirmation of the provisional order and wants it discharged, but also it has instituted ***Case 1*** to set aside the whole corporate rescue proceedings and Mr Chikamhi's appointment as the corporate rescue practitioner.

[] The applicant's case, distilled, is this. Placing the companies under corporate rescue was an abuse of an otherwise legitimate process. The Mukuwapasis were trying to avoid repaying legitimate debts owed by themselves and their companies. They not only failed to prove that their companies were under any financial distress, but also the purported resolution placing the companies under corporate rescue were patently defective for want of compliance with s 122[1] of the Act in that, among other things,

when the Mukuwapasis passed them, they did so, not as directors of the companies, but as shareholders.

[] The applicant further alleges that there is no evidence anywhere of any prospects of success of the corporate rescue proceedings and that the sworn statement by Edith Mukuwapasi was woefully inadequate for the purposes of s 122[3][a] of the Act, in that, among other things, it laid no factual foundation of the financial status of the companies in terms of balance sheets and the like.

[] Finally, the applicant submits that in purporting to place the companies under corporate rescue, s 122[3][g] of the Act was breached in that the notice of the resolution was not dispatched to all affected persons, including the relevant trade union for the industry and the National Social Security Authority ["***NSSA***"].

[] Mr Chikamhi fronted the case for the respondents. The fourth and fifth respondents essentially made common cause with all the other respondents.

[] The respondents have raised a point in *limine* that the applicant has used the wrong form for its application. It is argued that in the Commercial Division, the Rules provide for the use of Form No CC10 for applications of this nature but that the form used by the applicant is unknown. As such, the argument proceeds, there is no proper application before the court.

[] The respondents' further objection is that for its application under ***Case 1***, the applicant omitted to send the standard notices to all affected persons as required under s 123[3][b] of the Act. It is argued that this is another reason why ***Case 1*** should not be determined on the merits.

[] On the merits, the respondents argue that the mandatory notices in terms of the Act were dispatched to all known affected persons as required by the Act and that the applicant gives no reason why it should allege that the trade union and NSSA should have been notified.

[] The respondents refer to Edith Mukuwapasi's sworn statement in support of the resolution for the corporate rescue as containing all the requisite evidence and the necessary detail of the companies' insolvency and their reasonable prospects for recovery if given a chance.

[] The respondents accuse the applicant of extreme selfishness in that instead of allowing the corporate rescue proceedings to run their course for the benefit of the companies, the benefit of their creditors, the benefit of their employees, the school children and the shareholders, the applicant is only looking at its own interests with no concern whatsoever for these other stakeholders.

[] The respondents argue further that the fact of the companies being under financial distress is self-evident because they failed to pay their debts to none other than the applicant itself, which led to the attachment of their assets.

[] As for the prospects of success of the corporate rescue process, the respondents allege, among other things, that within a short space of time of Mr Chikamhi assuming office, electricity was restored to the school, that the school had been selected by the Government as a centre for manpower development, thereby expanding the revenue streams, and that the outstanding teachers' salaries have been paid.

[] In ***Case 2***, the applicant submits that the provisional order should not be confirmed mainly in that the placement of the companies under corporate rescue proceedings was a sham as more fully set out in ***Case 1***. At any rate, it is further argued, the provisional order was obtained practically *ex parte* as the applicant was not afforded any opportunity to contest it. It is further argued that in fact, there is nothing precluding execution against the personal assets of the Mukuwapasis because the provisional order did not extend to them.

[] From the case line-up above, it is considered that the issues for determination are these:

- *In limine*, is ***Case 1*** so fatally defective for want of form as to be undeserving of the court's jurisdiction, firstly, by reason of the use of, allegedly, a wrong form, and secondly, by reason of an alleged failure to notify all the affected persons?
- On the merits, were the resolutions to place the companies under corporate rescue defective, allegedly for want of compliance with s 122[1] of the Act, allegedly in that they were issued by the shareholders of the companies instead of its directors, that effected persons in the form of the trade union and NSSA were not notified by standard notice, and that Edith Mukuwapasi's sworn statement lacked the requisite evidence and detail required by the law?
- Still on the merits, is there sufficient evidence of the reasonable prospects of success of the corporate rescue proceedings or was the true purpose of placing the companies under corporate rescue allegedly an attempt by the shareholders to grant themselves an unjustified moratorium to pay the debts collectively owed by their companies and themselves?

[] These issues will now be considered in turn.

[a] *Is **Case 1** fatally defective for want of form?*

[] With all due respect, I have not quite appreciated the respects in which ***Case 1*** is said to be defective for want of form. This objection seems to be one of those that are often raised merely as a mandatory ritual: see *Rufasha v Bindura University & Ors* 2016 [2] ZLR 668 [H], at 669F – G, or as a matter of routine and fashion: see *Telecel Zimbabwe [Pvt] Ltd Postal & Telecommunications Regulatory Authority of Zimbabwe & Ors* 2015 [1] ZLR 651 [H], at 659B – D. This objection seems a sterile argument about forms: see *Mazombwe v Zimbabwe Open University v Mazombwe* 2009 [1] ZLR 101 [H], at 103C and *Marick Trading [Pvt] Ltd v Old Mutual Life Assurance Company Zimbabwe Ltd & Anor* 2015 [@] ZLR 343 [H].

[] ***Case 1*** was brought in terms of s 123[1] of the Act. This provision permits an affected person such as a creditor of a company to apply for the setting aside of a board resolution to commence corporate rescue proceedings of the company.

[] Neither s 123[1] aforesaid nor any other provision of the Act prescribes the form for this type of application. This must mean that the generic form for applications as prescribed by the rules of court apply, but with appropriate modifications.

[] Form CC10, which is prescribed by the High Court [Commercial Division] Rules, 2020 [SI 123 of 2020], is a notice by the applicant to the respondents of the applicant's intention to apply for an order in terms of the draft to be attached and supported by any documents as may also be attached. Such a notice advises the respondents of their right to oppose the application in terms of notices of opposition in the prescribed form, affidavits and documents, all to be filed within a period of ten [10] days. The form also informs the respondents of their right to serve their notices of opposition electronically. The form ends with some kind of warning on what should happen should the respondents fail to file their opposing affidavits within the prescribed period, namely, that the application can be set down without any further notice to the respondents, and will be dealt with as an uncontested matter.

[] *In casu*, the applicant apparently used the form of application as prescribed by the High Court Rules, 2021 [SI 202 of 2021], namely Form 23. But this Form is almost identical to Form CC10, the only discernible differences being that whilst in the Commercial Division the Form is CC10, in the General Division it is Form 23; while in the Commercial Division the notice of opposition must be in Form 29A, in the General Division it must be in Form 24 and, finally, while in the Commercial Division there is provision for electronic service of documents, there is no such provision in the General Division, at least on Form 23.

[] However, and with all due respect, only an antiquarian or a "*niggling academic out of touch with reality*" should pivot an objection on such a frivolous ground. In a different context, ROBINSON J, in the case of *Intercontinental Trading [Pvt] Ltd v Nestle Zimbabwe [Pvt] Ltd* 1993 [1] ZLR 21 [H], at 42G – 25A, was driven to remark:

> "Let me add that to have found in this matter that there was no contract between the parties would have been artificial in the extreme and, I am sure, would have prompted any reasonable businessman to remark that if, before, he had thought that the law was an ass, he now knew for certain that it was, since it had shown itself to be the domain of niggling academics out of touch with reality and to have nothing to do with the cut and thrust of the business world where one is concerned, not with the legal niceties pertaining to, but with the perceived existence of a contract."

[] Whether one makes an application using Form CC10 of the Commercial Division Rules, or Form 23 of the General Division Rules, the practical effect is the same. Both forms give notice of such of the procedural rights as the respondents are entitled to. These were the issues exhaustively debated in cases such as *Mazombwe* and *Marick Trading* above.

[] In any case, the respondents have not mentioned any prejudice as might have been suffered by the applicant's use of Form 23, instead of Form CC10. In *Trans-African Insurance Co Ltd v Maluleka* 1956 [2] SA 273 [A], at p 278F – G, the court stated:

> "No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

[] The respondents' first objection in ***Case 1*** is hereby dismissed for want of merit.

[b] *Is **Case 1** fatally defective allegedly by reason of the applicant's failure to notify all the affected persons?*

[] In terms of s 123[3] of the Act, an affected person who applies in terms of s 123[1] to set aside a company resolution for corporate rescue must, among other things, notify each affected person by standard notice.

[] In terms of s 121[1][a] of the Act, 'affected person' means a shareholder or creditor of a company, any registered trade union representing the employees of the company, or the employees themselves or their representatives, if they are not members of a trade union. In terms of s 2 of the Act, 'standard notice' means a notice by registered mail, fax, e-mail or personal delivery.

[] The applicant served ***Case 1*** on Willedit Investments, Mr Chikamhi and the Master of the High Court only. It is common cause that no other person was served or notified of the application.

[] The respondents hinge their objection on the fact that the Mukuwapasis, as shareholders of the companies, were not served. The fourth and fifth respondents allege that despite their status as creditors, they too were not served or notified. They also allege that it was only after their joinder application in HCHC711-24 aforesaid that they were later joined to the present proceedings. According to the respondents, this is fatal proof of non-compliance with the requirements of the law.

[] Evidently, the purpose of notifying each of the affected persons as directed by s 123[3][b] of the Act is so that they may rise to protect their interests, if they may so wish. It is to avoid a situation whereby, if the matter goes to court, a court may give a ruling which may be prejudicial to an interested party who never had an opportunity to protect their interests because of their having been unaware of the proceedings. In *Unitime Investments [Pvt] Ltd v Assetfin [Pvt] Ltd & Ors* HH 137-23, MUSITHU J held as follows, at p 15 of the cyclostyled judgment:

> "The purpose of serving pleadings on interested parties is to alert such party of the existence of a case against them and inform them of their right to respond should they be so minded. It is intended to avoid prejudice to an interested party who may find himself saddled with a judgment or order of court, being a product of a litigation process that they were not aware of."

[] The court went further in that case to state that the test to apply on whether an application should fall away or not is the prejudice suffered or to be suffered by the party that is not notified of the proceeding. It is all in the discretion of the court. I associate myself with such sentiments.

[] The main protagonists in this dispute are the applicant, the companies through Mr Chikamhi and the Mukuwapasis. However else the fourth and fifth respondents eventually got to know about ***Case 1***, they are now before the court. Everything else is water under the bridge. None of the respondents has pointed out any prejudice to themselves as stemming from any alleged failure by the applicant to serve notices in terms of s 123[3][b] of the Act. They have also not apprised the court of any other interested party or affected person as was not notified.

[] If in fact there might have been any affected person in terms of s 123[3][b] of the Act as should have been notified of, or served with ***Case 1***, but was not, then the blame must lie on the respondents. ***Case 1*** was a rejoinder of an on-going process started by the respondents. Neither the impugned resolution nor the purported sworn statement by Edith Mukuwapasi in terms of s 122[3][a] of the Act gave any details or indication of any such affected persons as could have been notified by standard notice.

[] The objection that ***Case 1*** should not proceed on the merits allegedly because s 123 [3][b] of the Act was not complied with is also hereby dismissed for lack of merit.

The Merits

[c] *Were the resolutions to place the companies under corporate rescue defective for want of compliance with s 122[1][a] of the Act?*

[] The one respect in which the applicant attacks the resolutions placing the companies under corporate rescue is that they did not comply with s 122[1] of the Act in that the resolutions were passed by the shareholders of the companies, and not by the directors. It is argued that the directors merely rubber-stamped a decision of the shareholders without themselves applying their own minds to the requirements of the law, that only the directors themselves must have believed on reasonable grounds that the companies were financially distressed and that there appeared to be no reasonable prospect of rescuing them.

[] It will be remembered that at all material times the Mukuwapasis doubled up as co-shareholders and co-directors of the company.

[] Section 122 of the Act provides for a company resolution to commence corporate rescue. Sub-section [1] reads:

> "Subject to subsection [2][a], the board of a company may resolve that the company voluntarily begin corporate rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that –
>
> [a] the company is financially distressed; and

[b] there appears to be a reasonable prospect of rescuing the company." [*underlining for emphasis*]

[] The resolutions for the two companies, identical in all material respects, read as follows:

> "**EXTRACT OF MINUTES OF MEETINGS OF THE BOARD OF DIRECTORS OF WILLEDIT INVESTMENTS [PRIVATE] LIMITED HELD AT HARARE ON THE 19TH DAY OF JULY 2024**
>
> **REPORTED**: -
>
> 1. That on the 19th day of July 2024, the Shareholders of Willedit Investments [Private] Limited ["the Company"] passed a special resolution for the commencement of corporate rescue proceedings in terms of section 122 of the Insolvency Act [Chapter 6:07]
>
> 2. The said special resolution empowers the Board to commence and pursue the corporate rescue proceedings and to engage a corporate rescue practitioner who will oversee and supervise the business of the company, in accordance with the duties of a corporate rescue practitioner, in a manner that will achieve better returns for creditors and shareholders and in a manner that will safeguard the interests of stakeholders, including employees.
>
> 3. The Board has identified Mr Budhama Chikamhi as a suitable corporate rescue practitioner for the purpose of undertaking the proposed mandate.
>
> 4. Steps have to be taken to consummate the above.
>
> **RESOLUTIONS:-**
>
> **IT WAS RESOLVED:-**
>
> 1. The Company resolves to voluntarily commence rescue proceedings in respect of the Company in terms of Section 122 of the Act.
>
> 2. The Company appoints Mr Budhama Chikamhi as the corporate rescue practitioner for the purpose of conducting the Company's corporate rescue proceedings.
>
> 3. That Edith Mukuwapasi … be and hereby empowered and authorized to sign all documents and agreements relating to the corporate rescue proceedings on behalf of the Company." [*underlining for emphasis*]

[] Mr *Nyamakura*, for the applicant, argues that in terms of those underlined provisions of the Act, the power to assess whether a company is so distressed as to require corporate rescue, and to decide to actually place it under corporate rescue is reposed solely in the directors of the company and in no one else, not even the shareholders. He argued that the underlined passages in the resolution show clearly that it was not

the directors, but the shareholders whose belief it was that the companies be placed under corporate rescue, something not contemplated by s 122[1] of the Act.

[] Mr *Murondoti*, for the respondents, argues that it does not matter the origin or genesis of the decision to go for corporate rescue of a company, as long as the company, through its properly constituted board of directors, and in a properly constituted meeting, decides to place the company under corporate rescue. In this regard, he relied on the case of *City Centre Hotel [Pvt] Ltd v Nyamanhindi* 1999 [1] ZLR 81 [H] where this court, per MUBAKO J, seemed to suggest or imply that a resolution by the shareholders on a matter in the exclusive domain of the directors, needs to be referred to the directors.

[] Mr *Murondoti* further argues that it is not a matter of law but pragmatism and that if the extracts of the resolutions in questions are properly examined, they show that the first portions recorded the meeting of the shareholders, and the second portions, a meeting of the board, albeit being the same persons.

[] In my judgment, because of the peculiar facts of this case, the resolutions in question cannot be set aside just because they might have been passed by the Mukuwapasis sitting as shareholders and not by themselves sitting as directors of the company. In the circumstances of this case, that distinction is too artificial. The first portions of the extracts of the resolution show that the Mukuwapasis first sat as shareholders. The second portions show that they then sat as directors but on the same day, the same time and the same place.

[] I consider it an unnecessary splitting of hairs amounting nit picking to suggest or imply that when the Mukuwapasis initially sat as shareholders and entertained the belief that the companies were financially distressed but with reasonable prospects of rescue, they then ought to have disabused or disgorged themselves of that belief as shareholders, wear their hats as directors, and then gone on to exercise their minds afresh on the same issues, but now as directors. This kind of argument would also be the domain of "*niggling academics out of touch with reality*" as ROBINSON J, *supra*, would say.

[] The court declines to set aside the resolution in question solely on the ground that it was passed by the Mukuwapasis as shareholders of the company and not as directors. After all, corporate rescue proceedings the world over are a procedure designed to restructure a company in financial distress so as to avoid outright liquidation. This is done for the benefit of a far larger constituency than that served by the now defunct judicial management procedure. As MALABA CJ put it in *Metallon Gold Zimbabwe [Pvt] Ltd & Ors v Shatirwa Investments [Pvt] Ltd* SC 107-21, this procedure has far-reaching beneficial effects on creditors, financial institutions, shareholders, employees and society at large.

[] Therefore, in any given situation, where valid grounds for corporate rescue of a company exist, the procedure cannot be defeated on nebulous principles and mere academic arguments.

[d] *Were the resolutions to place the companies under corporate rescue defective for want of compliance with s 123[1][a] of the Act, as read with s 121[a]?*

[] It will be remembered that s 123[1][a] of the Act is the one that provides for the giving of a notice by standard notice of the resolution to commence corporate rescue, together with a sworn statement to every affected person within five [5] business days. It will also be remembered that in terms of s 121[1][a] of the Act, 'affected person' includes any registered trade union representing employees of the company.

[] The other respect in which the applicant alleges that the resolutions in question must be set aside for want of compliance with the law is that the respondents did not notify the trade union and NSSA.

[] However, this ground of attack was never sufficiently developed. It remained a nude averment or argument. At the very least, no attempt was made to identify the trade union that ought to have been notified but was not. Furthermore, it was not explained in terms of which provision of the law was NSSA required to be served. Of course, NSSA was one of the entities mentioned in the *Metallon Gold* case above. But this

was because of the particular facts of that case. This ground of relief is not sustainable.

[d] *Has there been any sufficient evidence proffered of the reasonable prospects of success of the corporate rescue proceedings?*

[] The other respect in which the applicant attacks the resolutions for corporate rescue is the argument that the true purpose for placing the companies under corporate rescue was so that the shareholders could secure an unjustified moratorium to pay the debts owed by themselves and their companies jointly. It was argued that the move was an abuse of an otherwise legitimate and noble process of corporate rescue. Reference was made to the timing of the resolutions, 19 July 2024, relative to the date of the notification by the Sheriff of the auction date, 18 July 2025, and the date of the almost *ex parte* order of stay of execution, 25 July 2024.

[] Attention was drawn to the sworn statement by Edith Mukuwapasi which was purportedly made in terms of s 122[3][a] of the Act. It was attacked on the basis that it lacked any of the basic facts as must be alleged to inform and convince any third party, including the Master of the High Court or a court, of the relevant facts upon which the board resolution to place the companies under corporate rescue was founded, as contemplated by s 122[3][a] of the Act.

[] Section 122[3][a] of the Act reads:

> "Within five business days after a company has adopted and filed a resolution, as contemplated in subsection [1], or such longer time as the master, on application by the company, may allow, the company must –
>
> [a] give notice of the resolution, and its effective date, by standard notice to every affected person, <u>including with the notice of a sworn statement of the facts relevant to the grounds on which the board resolution was founded</u>; and
>
> [b] … … [not relevant] … …" [*underlining for emphasis*"]

[] My *Nyamakura* argues that the placement of the companies under corporate rescue was not based on any sincere belief that the companies were financially distressed or that they had any reasonable prospects of recovery if placed under corporate rescue. He contends that nothing contained in Edith Mukuwapasi's sworn statements sheds

any light on the actual situation of the companies on the ground in terms of their financial status. He accuses Mr Chikamhi of having forged an unholy alliance with the shareholders to benefit themselves instead of acting independently as his office demands.

[] Mr *Murondoti* argues that the shareholders acted in the best interests of the companies by taking action to avoid them being liquidated and that Edith Mukuwapasi's sworn statements provided sufficient information on the financial status of the companies by making reference to the liabilities of the companies being in excess of the assets and that the mere inability of the companies to settle the applicant's debts was in itself sufficient evidence of financial distress. He argues further that Mr Chikamhi was acting independently.

[] Edith Mukuwapasi's sworn statements are dated 26 July 2024. After the preambles in which she identifies herself as the deponent, and after laying the basis of her authority, the gravamen of the statement can be paraphrased as follows:

- The resolution to commence corporate rescue proceedings was passed by the board of directors on 19 July 2024 and filed with the Master of the High Court.
- The companies are financially distressed because their liabilities, approximated at just over USD2 million, exceed the assets, approximated at just over USD1.2 million, and they are unlikely to pay their debts in the ensuing six months.
- The companies operate Knowstics Academy. They hold vast tracts of land.
- Despite the formidable brand they established in Knowstics Academy, the companies are unable to pay their debts and have court orders and enforcement actions against them.
- The companies had almost concluded debt swap agreements with reputable financial institutions that would enable them to settle their liabilities in the short term and provide a new lease of life in the long term.
- Several potential investors had engaged the companies to purchase either their assets or their entire shareholding to achieve greater value for creditors and shareholders.
- There are plenty other viable options for the companies which are attractive by reason of the stellar educational brand that they created in Knowstics Academy, but all these efforts are being scuttled by the threats of judicial attachments.

- The board has recommended the appointment of Mr Chikamhi as corporate rescue practitioner.

[] In s 121[1][f] of the Act, financial distress in relation to a company, and in paraphrase, refers to a reasonable likelihood of a company being unable to pay all its debts as they become due and payable within the ensuing six months, or the reasonable likelihood that the company will become insolvent within the immediately ensuing six months.

[] In my judgment, it was incumbent for Edith Mukuwapasi's sworn statement to shed more light on the information that the Act prescribes. Her statement was too shallow. It did not provide any useful information as would enable any third party, such as a court, to make any such reasonable assessment on the state of the companies as would inform whether the board resolutions to commence corporate rescue proceedings were justified or not.

[] Edith Mukuwapasi's sworn statement is so short of some very basis information. For example, it does not inform the nature and extent of the shareholding in the companies, the paid up and unpaid up capital, the balance sheet of the companies, a list of the creditors and debtors of the companies, their labour force, and so on. This list is not exhaustive.

[] I consider it inadequate for Edith Mukuwapasi to have just plucked figures from unexplained sources and plant them in her statements as the total creditors and total value of assets.

[] The sworn statement did not explain the basis of the belief that there was no reasonable likelihood of the companies paying all its debts in the ensuing six months or that there was a reasonable likelihood that they would be liquidated in the ensuing six months. There were just nude allegations made, especially in the absence of any financial statements to back them up. It was not even shown that the companies were not a successful concern. That their debts had been attached was not sufficient proof in itself that they had become financially distressed. Judgments against, and execution

of assets of trading companies are not by themselves necessarily evidence of financial distress or commercial insolvency.

[] The case of *Metallon Gold* above provided useful guidelines on the approach by the court in considering the question of a company being in financial distress. It was stated as follows, at p 20 – 21 of the cyclostyled judgment:

> "A court must consider the complete financial position of the company when determining whether there is a reasonable likelihood that the company will be insolvent within six months.
>
> A company will be regarded as being in financial distress where it is insolvent after all other circumstances have been considered, including considering alternative fair values of the assets and liabilities, factoring in reasonably foreseeable assets and liabilities, as well as considering any other proposed measures taken by management such as subordination agreements, recapitalisation or letters of support.
>
> … … … …
>
> However, identifying when a company is financially distressed is not a straightforward process, with part of the difficulty resting with how the initial assessment of the financial state of a company is conducted. The evaluation of a company's solvency state relies on somewhat rough benchmarks, often referred to as the cash flow and balance sheet tests. The tests are not intended to be accurate mechanisms employed to determine the exact financial situation of a struggling company, but should be used as a statutory rule to determine whether a company is insolvent for certain legal purposes."

[] None of that analysis was done, either at the time, or in the present proceeding. It will be remembered that the debts that apparently triggered corporate rescue amounted to US$131 589-39 against Willedit Investments, and US$554 446-24 against Knowz Wandaland, to both of which the Mukuwapasis were jointly and severally liable. In the absence of any context in which these debts stood in relation to the balance sheet of the companies, it becomes difficult for a court to justify the resolutions that were passed to commence corporate rescue. The situation is compounded by the apparent inability by, or unwillingness of the Mukuwapasis to decouple their own circumstances from those of the companies.

[] As the learned Chief Justice explained in the *Metallon Gold* case above, corporate rescue has far reaching consequences. In my judgment it upsets the economic and social equilibrium as existing between the affected parties. It is not a procedure to

resort to lightly. It must be justified. It was not, and has not been justified in these proceedings.

[g] *Disposition*

[] In the final analysis, I consider that corporate rescue was just a ploy to defeat execution. The setting in motion of the process was perfunctory. The law was not followed. The resolutions to commence corporate rescue are liable to be set aside. Mr Chikamhi's appointment as corporate rescue practitioner falls by the way side. The involvement of the fourth and fifth respondents to these proceedings is of no consequence.

[] However, the applicant's claim for a penal order of costs has not been justified. Accordingly, the following orders are hereby granted:

i/ The resolutions dated 19 July 2024 for the commencement of corporate rescue of the first respondent in the proceedings under the case reference number HCHC643-24 [***Case 1***] and of the first applicant in the proceedings under the case reference number HCHC540-24 [***Case 2***] are hereby set aside.

ii/ By reason of the foregoing, the appointment as corporate rescue practitioner of the second respondent in ***Case 1*** is hereby set aside.

iii/ The provisional order in ***Case 2*** is hereby discharged.

iv/ The costs of suit in ***Case 1*** and ***Case 2*** shall be borne by the first, second, fourth and fifth respondents in ***Case 1***, and the applicants in ***Case 2***, jointly and severally, the one paying the others to be absolved.

14 March 2025

Atherstone & Cook, legal practitioners for the applicant in ***Case 1***, being the first respondent in ***Case 2***.
Absolom & Shepherd, legal practitioners for the first and second respondents in ***Case 1***, and for the applicants in ***Case 2***.
Muza Attorneys, legal practitioners for the fourth and fifth respondents in ***Case 1***.