

TRM

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Commercial Jurisdiction)*

2019/HPC/358



**IN THE MATTER OF : THE CORPORATE INSOLVENCY ACT NO. 9 OF 2017**

**IN THE MATTER OF : SECTION 22(1) (a) OF THE CORPORATE INSOLVENCY ACT NO. 9 OF 2017**

**IN THE MATTER OF : SECTION 22(1) (b) OF THE CORPORATE INSOLVENCY ACT NO. 9 OF 2017**

**IN THE MATTER OF : METALCO INDUSTRIES COMPANY LIMITED, ZALCO LIMITED AND CENTRAL RECYCLING COMPANY LIMITED (IN BUSINESS RESCUE)**

**B E T W E E N:**

<b>FIRST NATIONAL BANK ZAMBIA LTD</b>	<b>1<sup>st</sup> PLAINTIFF</b>
<b>FIRST RAND BANK LIMITED</b>	<b>2<sup>nd</sup> PLAINTIFF</b>
<b>AND</b>	
<b>METALCO INDUSTRIES COMPANY LTD</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>ZALCO LIMITED</b>	<b>2<sup>nd</sup> DEFENDANT</b>
<b>CENTRAL RECYCLING COMPANY LTD</b>	<b>3<sup>rd</sup> DEFENDANT</b>
<b>FELIX CHISAMBO</b>	<b>4<sup>th</sup> DEFENDANT</b>

**Before Mr. Justice Bonaventure C. Mbewe in Chambers on the 25<sup>th</sup> day of November, 2019.**

*For the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs* : *Mr. Y. G. Yosa of Messrs. Musa Dudhia and Co.*

*For the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants* : *Ms. N. Mbuyi with Ms. N. Chileshe of Messrs. Paul Norah Advocates*

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## **R U L I N G & J U D G M E N T**

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### **Cases Referred to:**

- 1. Panamo Properties (Pty) Limited and Another v. Nel and Others 2015 (5) SZ 63 (SCA)*
- 2. Southern Palace Investments 265 (Pty) Ltd v. Midnight Storm Investments 2012 (2) SA 423 (WCC)*
- 3. ABSA Bank Limited v. Golden Dividend 339 (Pty) Ltd and 2 others Case No. 70637/13*
- 4. African Banking Corporation of Botswana v. Kariba Furniture Manufacturers and Others (2015) ZASCA 69*

### **Other Authorities Referred to:**

- 1. Corporate Insolvency Act No. 9 of 2017*
- 2. Rules of the Supreme Court of England 1999, Edition (White Book)*
- 3. The Concise Oxford Dictionary of Current English 7th Edition (Oxford University Press: 1982)*
- 4. Black's Law Dictionary (2<sup>nd</sup> Ed)*

## **INTRODUCTION**

This cause was commenced by the Plaintiffs by way of Originating Summons and the Plaintiffs filed an affidavit in support, skeleton arguments and a list of authorities on the 8<sup>th</sup> of August, 2019.

The Plaintiffs seeks the following reliefs;

- 1. An order setting aside the resolutions dated 22<sup>nd</sup> February, 2019 to place Metalco Industries Company Limited, Zalco Limited and Central Recycling Company Limited in business rescue on the grounds that there is no reasonable prospect of rescuing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant Companies and that it is otherwise just and equitable to do so;*
- 2. In the alternative, an order setting aside the appointment of Felix Chisambo on the grounds that he lacks the necessary skills having regard to the circumstances of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant Companies and that he has failed to exercise the proper degree of care in the performance of his functions;*
- 3. Any other relief the Court may deem fit ; and*
- 4. Costs*

The Affidavit in support of the Originating Summons is sworn by one Cornelis Abraham Verster a South African National in his capacity as the National Manager of the 2<sup>nd</sup> Plaintiff Company.

The Defendants' Counsel on the 26<sup>th</sup> of August, 2019 filed their Notice of appointment of Advocates and on the same date filed their Notice of Intention to Raise Preliminary issue to set aside application for irregularity which I heard and delivered a ruling thereon dismissing the Defendant's application on 31<sup>st</sup> October, 2019.

I issued Orders for directions dated 31<sup>st</sup> October, 2019 to prepare for hearing the Plaintiffs' Originating Summons application.

### **DEFENDANTS APPLICATION TO RAISE PRELIMINARY ISSUES OF 15<sup>TH</sup> NOVEMBER 2019**

The Defendants filed another application to raise preliminary issues on 15<sup>th</sup> November, 2019.

The issues they raised for the Court to determine are;

- 1. Whether or not this matter is properly before this Honourable Court in view of the fact that other creditors have approved the review of the Business Plan that the Plaintiff intends to now set aside;*
- 2. Is it not premature for the Plaintiffs to have moved the Court for purposes of setting aside the business plan in view of the fact that the Defendants together with the creditors have not exhausted all avenues under the business rescue proceedings for either vote for or against the business plan."*

I heard this application on 25<sup>th</sup> November, 2019 and dismissed it by a ruling ex-tempore, that upon a close perusal of the grounds and arguments contained in the affidavits and skeleton arguments and authorities filed herein, I was of the firm opinion that the Defendants' application was not made on sound ground as the Plaintiffs herein, if it did not approve the Business Rescue Plan, was not compelled by law to approve it.

**Section 36 (2) (a) and (b) of the Corporate Insolvency Act No. 9 of 2017** which states that;

**“(2) In addition to the rights set out in subsection (1),**

**A creditor has –**

**(a) The right to vote to amend, approve or reject a proposed business rescue plan, as provided in this part.**

**(b) A further right, if the proposed business rescue plan is rejected, to –**

**(i) Propose the development of an alternative plan as provided in this part, within thirty days; or**

**(ii) Present an offer to acquire the interest of any of or all the other creditors as provided in this part within thirty days.**

**(3) The creditors of a company are entitled to form a creditors committee through which the creditors are entitled to be consulted, by the business rescue administrator, during the development of the business rescue plan.”**

I ruled that the above law which is quoted by the Defendants is very clear in its wording and I therefore agreed with the arguments and reasoning put forward by the Plaintiffs in support of their prayer to dismiss the Defendants application. I accordingly dismissed the Defendants' application to raise preliminary issues filed in their notice of 15<sup>th</sup> November, 2019. I informed the parties that a more detailed ruling with my reasoning would be availed them at a later date and proceeded to hear the Originating Summons Application.

**DETAILED RULING EX-TEMPORE ON DEFENDANTS' APPLICATION TO RAISE PRELIMINARY ISSUES FILED ON 15<sup>TH</sup> NOVEMBER, 2019.**

The Defendants' application which applied for determination of the issues I set out above was supported by an affidavit sworn by one Felix Chisambo which attests that he is a Business Rescue Administrator of the Defendant Companies herein. He attests, that he is responsible for the Business Rescue Plan that was formulated to aid in resuscitating the Defendant Companies from their dire financial predicament which plan is on the Court's record. The

affidavit deposes that a creditors meeting was convened on 21<sup>st</sup> October, 2019 in order to cast a vote on whether the plan was viable and worthy of enforcement. A copy of minutes of the said meeting were produced as “FC1.”

The affidavit deposes that it is premature for the Plaintiffs to have moved the Court to determine the credibility of the business plan and have it set aside as the creditors have not exhausted all avenues internally before concluding that the business plan would be unworkable. The affidavit states that there are other creditors of the companies and the Court ought exercise its discretion cautiously so as not to disadvantage other interested parties under the business rescue proceedings and there is therefore no need for this matter to be further adjudicated upon in the face of the creditors decision to allow the business plan to be further scrutinized and evaluate its feasibility and potential for purposes of satisfying repayment of all the creditors and this is a case in which the Court should not interfere with the internal affairs of the Defendants.

The Defendants skeleton arguments argue that by **Section 36 (2) (a) and (b)** as well as **Section (3)** of the **Corporate Insolvency Act No. 9 of 2017**, the creditors have the preserve of reviewing the business rescue plan and the said creditors have agreed to render a chance for the Business Rescue Plan to be enforced and matters of dissenting creditors therefore take second precedence to the business rescue proceedings. They quote the case of **Panamo Properties (Pty)**

**Limited and Another v. Nel and Others (1)** (a South African authority).

The Defendants submit that the business rescue plan has not been given a chance to come to fruition and the Plaintiffs application is thus premature and that *“as regards balancing the rights of creditors, the Court is tasked with a duty to ensure that protective mechanisms are employed for the sake of dissenting creditors, which may include but are not limited to the following:*

- *That necessary approvals of the plan were obtained;*
- *That the mechanisms for the approval of the plan were properly conducted;*
- *That the plan does not attempt to include provisions that are contrary to insolvency or other laws; that administrative claims and expenses are settled in full except to the extent that agreement has been reached with the holder of such claim or where there is agreement that certain expenses are subjected to different treatment; and that the claims of dissenting creditors are ranked in terms of the relevant insolvency laws.”*

The Defendants pray that the Court dismisses the matter for irregularity.

The Plaintiffs in opposition filed an affidavit sworn by Yosa Grandson Yosa that sets out the sequence of events surrounding the

presentation of the Business Rescue Plan to the creditors which highlights several adjournments of the creditors meetings and a meeting of 4<sup>th</sup> October that did not proceed as the 4<sup>th</sup> Defendant had not booked a venue for the meeting and no notice of the meeting was given and the 4<sup>th</sup> Defendant did not seek consent of the creditors for postponement of the meeting leading his firm to write the 4<sup>th</sup> Defendant to inform him that any meeting convened after 15<sup>th</sup> October would be illegal. That the minutes of the meeting held on 21<sup>st</sup> October, 2019 are an incomplete record of the meeting which rejected the submitted plan and ordered a revised plan within 10 days thereof, which plan has not been submitted. The affidavit attests that there is no reasonable prospect of rescuing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the 4<sup>th</sup> Defendant is not competent and lacks the necessary skills to perform the functions of a business rescue administrator. The affidavit deposes that the Defendants have not complied with this Court's Order for Directions and instead made the current application before Court.

The Plaintiffs skeleton arguments argue that the Defendants multiple applications to raise preliminary issues are an attempt to delay the matter. The Plaintiffs, in support of their argument that the right of an affected person to apply to the Court to set aside the resolution to commence business rescue proceedings, is one that can be exercised at any time before the adoption of a business rescue plan, quote **Section 22 of the Corporate Insolvency Act No. 9 of 2017** which provides that;

**“Subject to subsection (2), at any time after the adoption of a resolution as specified in Section 21 and until the adoption of a business rescue plan in accordance with section 43, an affected person may apply to a Court for an order –**

**(a) Setting aside the resolution on the grounds that –**

- (i) there is no reasonable basis for believing that the company is financially distressed**
- (ii) there is no reasonable prospect for rescuing the company; or**
- (iii) the company has failed to satisfy the procedural requirements set out in Section 21.**

**(b) Setting aside the appointment of the business rescue administrator, on the grounds that the business rescue administrator –**

- (i) Is not qualified as provided in section 30;**
- (ii) Is not independent of the company or its management; or**
- (iii) Lacks the necessary skills, having regard to the company’s circumstances;**

The Plaintiffs submit that if the Defendants believe that there is a reasonable prospect of rescue, they should bring that evidence to Court to show that the revised plan is viable. It is submitted that the 4<sup>th</sup> Respondent has not even prepared a revised business rescue plan and the current application is a ploy to delay the hearing of the matter and an abuse of Court process thereby delaying the delivery of justice.

The Plaintiffs also quote **Section 44 (4) (a) of the Corporate Insolvency Act** which makes it mandatory for the 4<sup>th</sup> Respondent to prepare and publish a revised business rescue plan within 10 days of the creditors meeting resolution requiring him to do so. It is submitted that as at the date of swearing the affidavit, the 4<sup>th</sup> Respondent had failed to prepare a revised business rescue plan and the hearing of the Originating Summons application is therefore not premature and does not preclude this Court from hearing the matter. It is also pointed out in the affidavit that the Defendants have not cited any authority to support their proposition, that where affected persons are considering a revised business rescue plan, the Court is precluded from hearing an application to set aside a resolution to commence business rescue proceedings.

At the hearing, Counsel for both parties relied on the documents filed in support of and in opposition to the application and Mr. Yosa augmented to guide the Court that the Defendants had argued against the first of the relief sought and not argued against the second relief sought by the Plaintiffs in their originating summons.

## **RULING OF 25<sup>TH</sup> NOVEMBER 2019**

My Ruling of 25<sup>th</sup> November, 2019 stands and I wish to point out the fact that the **Corporate Insolvency Act** does in **Section 22** expressly allow an affected person such as the Plaintiffs herein to apply to Court for any of the orders specified therein and in this instance the Plaintiffs are requesting orders under **Section 22 (2) (a) (ii) and (b) (iii)**.

The facts in the affidavit in opposition filed into Court on 18<sup>th</sup> November, 2019 have not been opposed by the Defendants, as set out the sequence of events towards holding or failure to hold creditors meetings and the failure to submit a revised business rescue plan within 10 days as required by **Section 44 of the Act**.

Of note, is the fact that the Defendants cited **Section 36 of the Corporate Insolvency Act** which deals with rights of creditors in business rescue proceedings and does not therein bar any creditor or affected party from taking legal action as the Plaintiffs have done. Contrary to the Defendant's argument, the Court is not interfering in the internal affairs of the Defendants but merely discharging its duty to give audience to an affected party whom the law has given the right or liberty to challenge the manner in which the business rescue proceedings of the Defendant Companies are being done or carried out.

The Defendant's application was misconceived and doomed to fail as it is not supported by the law. It is a clear abuse of the Court's process. I therefore dismissed this application to raise preliminary issues, as the Plaintiffs main application is properly before this court and it is not premature for the Plaintiffs to have moved the court as they did. I award costs to the Plaintiffs.

### **ORIGINATING SUMMONS APPLICATION**

The Originating Summons application is supported by an affidavit sworn by one Cornelis Abraham Verster which attests that the Plaintiffs entered into credit facilities with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants whereby funds were advanced to the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were guarantors commencing in August 2013 which facilities were amended and restated in 2014. Further facilities were entered into in May 2018. The deponent has produced and exhibited various facility documentation entered into, in his affidavit.

The said facilities were secured by various securities which the deponent has listed in paragraph 17 of his affidavit listing all the securities under sub-headings of the different Defendants that gave the security.

The affidavit attests in paragraph 18, that the 1<sup>st</sup> Defendant breached the terms of the First National Bank Zambia Facility and the FirstRand Bank loan by failing to make monthly installment payments as and when they became due.

The affidavit also attests, in paragraph 24, that the Plaintiffs demanded payment of the sums outstanding under the FirstRand Bank Loan and the FNB Zambia Facility in October, 2018 by letters addressed to the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as guarantors. According to paragraph 42, as at 23<sup>rd</sup> February, 2019, the amounts owing were US\$6,598,886.97 under the FirstRand Loan and US\$5,943,854.68 under the FNB Zambia Facility which are supported by certificates of balance issued by the Plaintiff banks certifying the indebtedness due to them. The Affidavit goes on attest that despite numerous indulgences given by the Plaintiffs, protracted negotiations and reminders, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have not paid the sums due to the Plaintiffs and it was only when the Plaintiffs made it clear that they would proceed to enforce the securities they held, that the Three (3) Defendants proceeded to pass the resolutions to commence voluntary business rescue proceedings.

The affidavit sets out in detail, in paragraphs 46 to 106, how it was notified of the resolution to commence voluntary business rescue proceedings, of the 4<sup>th</sup> Defendant's appointment as Business Rescue Administrator for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants with effect from 22 February, 2019 and other matters that followed thereafter as well as

its analysis and position of the business rescue plan submitted, and its basis for arriving at the conclusion that the business rescue plan is speculative and the business rescue proceedings are a sham aimed at preventing the Plaintiffs and other creditors from enforcing the securities against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The facts attested to, are supported by documentary evidence buy way of exhibits.

The affidavit asks this Court to set aside the resolutions that commence the business rescue proceedings or in the alternative grant a liquidation order.

The Plaintiffs filed skeleton arguments in support of the Originating Summons which repeats some of the content of the affidavit. The skeleton arguments argues that the application is made pursuant to **Section 22 (1) (a) and (b) of the Corporate Insolvency Act No. 9 of 2017** which states as follows;

**“Subject to subsection (2), at any time after the adoption of a resolution as specified in Section 21 and until the adoption of a business rescue plan in accordance with section 43, an affected person may apply to a Court for an order –**

**(a) Setting aside the resolution on the grounds that –**

- (i) there is no reasonable basis for believing that the company is financially distressed**

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirements set out in section 21

(b) Setting aside the appointment of the business rescue administrator, on the grounds that the business rescue administrator –

(i) Is not qualified as provided in section 30;

(iii) Is not independent of the company or its management; or

(iv) Lacks the necessary skills, having regard to the company's circumstances;

The Act defines an affected person, in **Section 2** thereof, as follows;

**“affected person” includes a regulator, shareholder, member, director, creditor or an employee, a former employee of the company, registered trade union representing employees of the company and the Registrar.”**

The skeleton arguments go on to argue the law on what business rescue proceedings are and when a Court would set aside a resolution commencing business rescue proceedings citing South

African authorities among them the case cited by the Defendants of, **Panamo Properties (Pty) Limited and Another v. Nel and Others (1)** as well as **Southern Palace Investments 265 (Pty) Ltd v. Midnight Storm Investments (2)** which addresses the meaning of the words “reasonable prospect” with regard to a business rescue.

The skeleton arguments walk the Court through the minimum requirements for a business rescue plan as set out in **Section 42 (2) of the Corporate Insolvency Act** (I believe that the Plaintiffs are referring to **Section 41 (2)**) as well as the case of **ABSA Bank Limited v. Golden Dividend 339 (Pty) Ltd and 2 others (3)**. The Plaintiffs argue that a perusal of the published business rescue plan does not provide any direction regarding how and when the Companies will be turned around. The plan’s projections in Annexure D to the plan, are argued, that are not based on any financial statements which goes to show that they are speculative and not based on cogent evidence that can form the basis for an assessment of reasonable prospects of rescuing the Companies or sufficient information to address the problems faced by the Companies and develop real solutions. The lack of financial information available to the directors of the companies does not support the decision to commence business rescue proceedings. The Plaintiffs argue that the business rescue plan leaves the affected parties including the Plaintiffs at loss as to exactly what they are being asked to vote in favour of which the Plaintiffs argue demonstrates that there is no reasonable prospect of rescuing the Companies

The Plaintiffs rely on the South African Supreme Court decision in the case of **African Banking Corporation of Botswana v. Kariba Furniture Manufacturers and Others (4)** to back its arguments on the importance of financial statements.

The Plaintiffs submit that the Defendants actions were not a bona fide use of business rescue proceedings and ought not to be entertained as the Companies were not financially distressed but rather insolvent and did not meet the test in Section 21 of the Act. This is therefore a just and proper case in which to set aside the resolutions to commence business rescue proceedings as there is no reasonable prospect for rescuing the Companies and it is just and equitable to do so.

The same case of **African Banking Corporation of Botswana v. Kariba Furniture Manufacturers and Others (4)** is relied on by the Plaintiffs to argue that the 4<sup>th</sup> defendant does not possess the requisite skills to undertake business rescue administration having regard to the circumstances of the companies.

The Plaintiffs submit, following the arguments set out and backed by the African Banking Corporation case that this Court has power to set aside the appointment of the business rescue administrator under **Section 22 (1) (b) of the Act** and in this case the 4<sup>th</sup> Defendant's conduct falls short of the required standard and sets out

the evidence of the 4<sup>th</sup> Defendant's ineptitude and breach of his fiduciary duties as perceived by the Plaintiffs and therefore lacks the necessary skills having regard to the circumstances of the 3 Defendant Companies. They pray that this is a just and proper case for this Court to set aside the appointment of the 4<sup>th</sup> Defendant as business rescue administrator on the ground set out in **Section 22 (1) (b) (iii) of the Act.**

## **JUDGMENT**

The Plaintiffs' application is therefore properly before me as **Section 22** quoted above allows the Plaintiffs, who fall within the definition of affected person under the Act, is allowed to make this application.

What powers does this Court in determining this application? **Section 22 (5) (a) of the Corporate Insolvency Act** provides that;

**"The Court may, when determining an application made in accordance with paragraph (a) of subsection (1) –**

**(a) Set aside the resolution –**

- (i) On any ground set out in the subsection; or**
- (ii) If, having regard to all the evidence, the Court determines that it is otherwise just and equitable to do so;"**

The Defendants have not filed any affidavit or arguments in opposition to the Plaintiffs Originating Summons application and this application is therefore undefended.

In the premises, I find that the Originating Summons in this matter filed on the 08<sup>th</sup> of August, 2019 has proved the claims therein on a balance of probabilities and succeeds, as the Defendants herein have failed to oppose it in any way.

I hereby set aside the resolutions dated 22<sup>nd</sup> February, 2019 to place Metalco Industries Company Limited, Zalco Limited and Central Recycling Company Limited in business rescue on the grounds as pleaded, that there is no reasonable prospect of rescuing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant Companies and that it is otherwise just and equitable to do so. The actions and proceedings undertaken in pursuance of the resolution are therefore also set aside and a nullity. I also hereby set aside the appointment of Mr. Felix Chisambo on the grounds that he lacks the necessary skills having regard to the circumstances of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant Companies and that he has failed to exercise the proper degree of care in the performance of his functions.

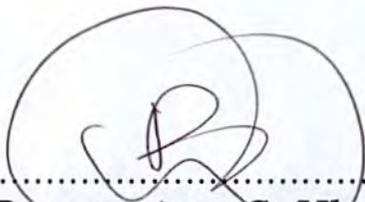
Having granted the Plaintiffs the reliefs sought in their Originating Summons application, should I go so far as place the Defendants into liquidation as put forward in paragraph 109 of the affidavit in

Support of the originating summons application? The same was not pleaded in the Originating Summons and it is trite law that the Court cannot grant relief which is not pleaded. An affidavit is not the rightful place for the Plaintiffs to have pleaded for this relief.

I award costs of this application to the Plaintiffs.

Leave to appeal is denied.

**Delivered at Lusaka this 12<sup>th</sup> day of June, 2020.**

A handwritten signature in black ink, consisting of a large, stylized 'B' and 'M' intertwined, positioned above a horizontal dotted line.

**Bonaventure C. Mbewe  
HIGH COURT JUDGE**