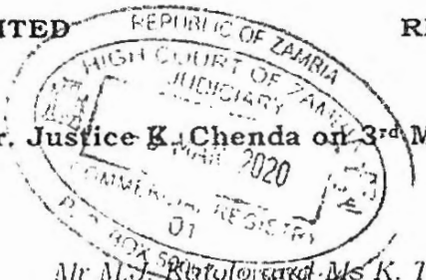
IN THE HIGH COURT FOR ZAMBIA **2019/HPC/0555**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

EXPORT TRADING LIMITED **APPLICANT**

AND

CHIMANGA CHANGA LIMITED **RESPONDENT**



Before the Honourable Mr. Justice K. Chenda on 3rd March 2020

For the Applicant : *Mr M.J. Ramotar and Ms K. Tembo both of Milner & Paul Legal Practitioners*

For the Respondent : *Mr A. Roberts of Alfred Roberts & Company*

RULING

On Motion to Dispose of Case on Points of Law

Legislation Referred to:

(i) The Corporate Insolvency Act No. 9 of 2017 in sections 14, 15, 16, 22, 25, 26, 27, 32

Rules of Court:

(ii) The Rules of the Supreme Court of England 1965, in Order 2 Rule 2, Order 5 Rule 3, 14A Rule 1 and 33 Rule 3

Case Law:

(iii) *Anderson Mazoka, Lt General Christon Tembo, Godfrey Miyanda v Levy Mwanawasa, The Electoral Commission of Zambia & The Attorney General* (2005) Z.R. 138

1. INTRODUCTION

1.1 The Applicant moved this Court by originating summons seeking in the main to set aside the voluntary business rescue proceedings ("**BR Proceedings**") instituted by the Respondent and the consequential appointment of a business rescue administrator.

1.2 The Respondent did not react to the merits of the action and instead deployed a motion for determination of the Applicant's case *in limine*.

1.3 The motion was opposed by the Applicant both on the merits and on grounds of its propriety on account of alleged irregularity. I propose to deal with the issue of propriety first before considering each substantive limb of the three pronged motion.

2. PROPRIETY OF RESPONDENT'S PRELIMINARY MOTION

2.1 The Applicant invited this Court to dismiss the Respondent's motion for alleged failure to comply with:

(i) the threshold requirement (of giving notice of intention to defendant) under 14A/2/3 of the Rules of the Supreme Court of England 1965 (the "**RSC**"); and

(ii) the requirement under 33/3/1 of the RSC to seek a prior Court order to frame preliminary issues as opposed to the self-help initiative of the Respondent to settle its own questions for determination.

2.2 If established, the said alleged lapses would amount to an irregularity in terms of Order 2 Rule 1(1) of the RSC.

2.3 However, according to Order 2 Rule 2 and explanatory note 2/2/4 of the RSC, the right to redress an irregularity can be waived if a party takes any fresh step which would only have been taken if the irregularity did not exist.[1]

2.4 In the case before Court, the record shows that on 18 February 2020, the Applicant filed an affidavit and arguments in opposition to the Respondent's motion on the merits. Such a step to defend the motion on the merits would surely only have been relevant if the alleged irregularities did not exist.

2.5 The Applicant therefore waived the right to fault the Respondent's motion for non-compliance with the Rules of Court.

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2. - Application to set aside for irregularity

*(1)**An application to set aside for irregularity** any proceedings, any step taken in any proceedings or any document, judgment or order therein **shall not be allowed unless it is made** within a reasonable time and **before the party applying has taken any fresh step after becoming aware of the irregularity***

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"Taken any fresh step after becoming aware of the irregularity

***A "fresh step" for the purpose of this rule is one sufficient to constitute a waiver of the irregularity. "In order to establish a waiver you must show that the party has taken some step which is only necessary or only useful if the objection has been actually waived or has never been entertained** (Rein v. Stein (1892) 66 L.T. 469, per Cave J. at p.471)."* (Emphasis added)

2.6 In the premises, the issue of the apparent irregularities cannot be raised at this late stage and I will accordingly proceed to determine the Respondent's motion on its merits.

3. ISSUE NO. 1:

"That the Court has no jurisdiction to hear the originating summons and ought to dismiss the action as procedurally in correct in view of the default by the Applicant in not obtaining either the written consent of the Respondent's business rescue administrator or the prior leave of Court to commence legal proceedings against the Respondent as per section 25 (1) (a) and (b) of the Corporate Insolvency Act No. 9 of 2017"

3.1 Section 22(1) of the Corporate Insolvency Act No. 9 of 2017 **("CI Act")** confers a statutory right on any affected person to apply to Court in objection to a resolution to begin voluntary business rescue proceedings ("BR Proceedings").

3.2 The Applicant, as an alleged affected entity, has sought to exercise that right. The Respondent has in this limb asserted that the exercise of the said right is subject to the moratorium under section 25 of the CI Act which inter alia dictates in 25(1)(a) and (b) that legal proceedings cannot be brought against a company during BR proceedings without the written consent of the BR administrator and prior leave of Court.

3.3 The question that I must therefore resolve is whether the exercise of the statutory right conferred by section 22(1) is subject to the restriction in section 25.

3.4 On the discourse of interpretation of statutes, the Supreme Court guided as follows in the case of ***Anderson Mazoka, Lt General Christon Tembo, Godfrey Miyanda v Levy Mwanawasa, The Electoral Commission of Zambia & The Attorney General***[2] wherein it was held *inter alia*:

> "***It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning***. *It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other principles of interpretation.*"[3] (Emphasis added)

3.5. Coming to the case before Court, section 22(1) of the CI Act is worded:

> "*22.(1)* ***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*

[2] (2005) Z.R. 138
[3] Ibid,.p.159 (lines 5-10)

(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; or

(c) requiring the business rescue administrator to provide security in an amount and on terms and conditions that the Court considers necessary, to secure the interest of the company and any affected person."

3.6 Quite clearly the invocation of section 22(1) is subject to or limited by subsection 2 thereof which for its part reads:

"(2) A director who voted in favour of a resolution to begin business rescue proceedings as provided in section 21 shall not apply to the Court, as specified in subsection (1), to set aside the resolution or the appointment of the business rescue administrator, unless the director satisfies the Court that in supporting the resolution, the director acted in good faith, on the basis of information that was subsequently found to be false or misleading."

3.7 There is no mention in section 22 that the right conferred in subsection (1) is subject to any other part of the CI Act besides subsection (2).

3.8 The end result is that there is no interplay between section 22(1) and 25(1) of the CI Act which by implication means that the right to object to a resolution to commence BR proceedings is not captured by the moratorium against legal proceedings.

3.9 The logic is also undeniable as an application pursuant to section 22(1) of the CI Act ***is not*** a legal proceeding against a company in BR proceedings but instead an action to challenge the validity of a resolution to commence voluntary BR proceedings.

3.10 In other words, the subject of a section 22(1) application is not a company but the very decision to place a company under voluntary BR proceedings both in terms of the procedure and merits of that decision. This may be contrasted with the position under section 25(1) where there is a restriction on proceedings ***against a company*** which is under BR proceedings ***and not*** a restriction on proceedings ***to challenge the decision*** to place a company under BR proceedings.

3.11 The Applicant did not therefore require the consent of the Respondent's BR administrator or the prior consent of this Court to commence this action.

4. ISSUE NO. 2:

"That the reliefs sought by the Applicant in paragraphs 1 and 2 of the Originating Summons as well as other contentious issues raised in the Affidavit in support of originating summons do not fall within the purview of Order 30 Rule 11 of the High Court Rules and as such the Applicant ought to have commenced the action by way of writ of summons and not originating summons."

4.1 The entire issue rests on the determination of what is the correct mode of commencement for a statutory application in objection to the commencement of voluntary BR proceedings.

4.2 Section 22 of the CI Act which confers the right is devoid of procedure on mode of commencement and so too is the rest of the CI Act and its subsidiary legislation as at date of commencement of this action. I have also checked the High Court Rules under Chapter 27 of the Laws of Zambia and not found any prescription on mode of commencement of a statutory application to the High Court.

4.3 I say High Court because section 22 (1) of the CI Act states that the requisite application may be made to "a Court" while section 2 defines "Court" as the "High Court". To fill this lacuna in our domestic rules of Court, my recourse is to invoke section 10 of the High Court Act which imports the RSC. The Applicant's Counsel were swift to point out order 5 Rule 3 of the RSC as a gap filler. It reads:

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>
> *3.Proceedings which must be begun by originating summons*
>
> ***Proceedings by which an application is to be made to the High Court or a judge thereof under any Act must be begun by originating summons except where by these rules or by or under any Act the application in question is expressly required or authorised to be made by some other means.*** *This rule does not apply to an application made in pending proceedings.* (Emphasis added)

4.4 I accept that submission as sound and rule that unless and until there are Court proceedings rules promulgated under the CI Act, a statutory application pursuant to section 22(1) must be brought by originating summons to challenge a decision to commence voluntary BR proceedings.

5. ISSUE NO. 3:

"That the rightful party to be cited as "Respondent" in the Originating Summons should have been "Chimanga Changa Limited (under "Business Rescue Proceedings") and not the name of Chimanga Changa Limited."

5.1 The Respondent has taken issue with the fact that the caption on the originating process and subsequent Court papers does not state next to the name of the Respondent that it is under BR Proceedings.

5.2 The Respondent has asked this Court to draw an analogy with the position where a company is in receivership suggesting that just like in receivership, there is a shift in *locus standi* from the Company to the BR administrator.

5.3 Tempting as the Respondent's argument may be, I am not persuaded by it as:

(i) the CI Act expressly requires the incident of receivership to be stated along with the name of a company on its official statutory and communications etc. see section 15 of the CI Act. There is however, no such requirement with respect to BR proceedings; and

(ii) the CI Act recognises the shift of *locus standi* to the receiver by providing for liability of the receiver on contracts (section 14) and for disposal of the companies' assets by the receiver (section 16). This can be contrasted with the position under BR proceedings as there is no liability for the BR administrator on contracts and the BR administrator's power is confined to just management and control of the company (see section 32(1)) while the power to sell is exercised not in the name of the BR administrator but still in the name of the company (see section 26(1)a and 26(3)) and indeed power to do other acts is still in the name of the company e.g. post BR proceedings finance (section 27 (1) and 27(2)).

5.4 In the premises I am inclined to reject the invitation to fault the caption of the Respondent in these proceedings which does not, as a rule, have to state that the Respondent is "*under BR proceedings*".

6. CONCLUSION AND ORDERS

6.1 Under the auspices of the CI Act, the stakeholders of a company can decide to place it under voluntary business rescue by passing a members' resolution pursuant to section 21.

6.2 Any person affected by such a decision has a statutory right to challenge it (procedurally and on the merits) by way of an application to the High Court pursuant to section 22(1) of the CI Act.

6.3 Since the subject of an application pursuant to section 22(1) is the decision (and not the company), such an application is not a legal proceeding against the company as envisaged by section 25(1). Consequently, the moratorium thereunder and requirements for leave of Court and consent of the business administrator are of no application.

6.4 The only fetter to the exercise of the statutory right under section 22(1) is subsection (2) which (as a general rule) bars a director who supported the BR resolution from later raising objection.

6.5 In the absence of provisions in the primary and / or subsidiary legislation for the mode of the said application, Order 5 Rule 3 of the RSC fills the lacuna by prescribing the originating summons procedure as applicable.

6.6 Unlike receivership, the appointment of a BR administrator does not result in transmission of *locus standi* from the company. There is no requirement for the name caption of a company to indicate (in Court proceedings) that it is under BR.

6.7 On the totality of the foregoing, the preliminary motion is bereft of merit on all grounds and is dismissed accordingly with costs.

6.8 However, owing to the novelty of the issues raised (which is an incident of the infancy of the relevant law on our statute books), I will grant the Respondent leave to appeal.

6.9 Having disposed of the preliminary issues, I issue the following directions for progression of the substantive matter:

(i) the Respondent must file and serve its affidavit and arguments in opposition to the originating summons by 13 March 2020:

(ii) the Applicant shall have the liberty to file and serve its documents in reply by 20 March 2020: and

(iii) the hearing of the originating summons shall follow on 24 March 2020 at 08:30 hours.

Dated this ----------day of---------- ----------2020

K. CHENDA
JUDGE OF THE HIGH COURT