IN THE HIGH COURT FOR ZAMBIA **2019/HP/1600**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

JOSEPH GONDWE **PLAINTIFF**

AND

MOBILE BROADBAND LIMITED **DEFENDANT**

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE PLAINTIFF: MR. P. SINKALA OF MESSRS VENTUS LEGAL PRACTITIONERS

FOR THE DEFENDANT: MR. M. NKUNIKA OF MESSRS SANGWA & ASSOCIATES

RULING

Cases Referred To:

1. *African Banking Corporation v Mubende Country Lodge Limited Appeal No.116/2016*
2. *Re London Pressed Hinge Company Ltd v London Pressed Hinge Company Ltd [1905] 1Ch. 576*
3. *Finsbury Investment Limited v Antonio Ventriglia and Others (Selected Judgment No.42 of 2016)*
4. *Chimanga Changa Limited v Export Trading Limited Appeal No 76/2020*

Legislation Referred To:

1. *Rules of the Supreme Court 1965 (1999 Edition) (White Book)*
2. *The High Court Act, Chapter 27 of the Laws of Zambia*
3. *The Corporate Insolvency Act No.9 of 2017*

Other Works Referred to:

1. *Brenda Hannigan, Company Law 3rd Edition, Oxford University Press (2012)*
2. *Stephen Griffin, Company Law, Fundamental Principles, 4th Edition, Pearson Education, (2006)*
3. *Roy Goode, Principles of Corporate Insolvency Law, 4th Edition, Sweet and Maxwell (2011)*

This is the plaintiff's application for the determination of preliminary issues on a point of law. The application was made pursuant to Order 14A Rule 1 and 2, Order 33 Rule 3 and Rule 7 of the Rules of the Supreme Court 1965 (White Book) 1999 Edition as well as Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia. The application is for the determination of the following issues:

"Whether Mr. Robert Simeza has locus standi to bring an application on behalf of the defendant company which is subject to Business Rescue Proceedings; whether Mr. Robert Simeza has the capacity to act on behalf of the defendant or as the defendant, as a result of his appointment as Receiver by a creditor, when the defendant company is under Business Rescue Proceedings; and based on the determination of the questions of law above, that the application to set aside writ of summons and default judgment

made by Mr Robert Simeza on 3rd September, 2020, be struck out with costs."

The application is supported by an affidavit dated 25th September, 2020, deposed to by Joseph Gondwe, the plaintiff herein. He deposed that by writ of summons and statement of claim dated 4th October, 2019, the plaintiff commenced an action against the defendant herein for the payment of a total sum of ZMW 482,925.60 and obtained judgment in default on 23rd October, 2019, for the said sum (judgment debt).

The plaintiff also deposed that on 7th November, 2019, a writ of fieri facias was filed for the enforcement of the judgment, pursuant to which, the sheriff of Zambia's bailiff's proceeded to enforce execution on 21st November, 2020. He added that in the process of execution, two Cummins generators were seized by walking possession.

It was also deposed that subsequent to the execution and by letters dated 4th December, 2019, and 9th December, 2019, to his advocates, the plaintiff was made aware that Mr. Robert Simeza had been appointed Receiver on 22nd November, 2019, over the assets of the defendant company, as shown by exhibit marked "JG1".

The plaintiff deposed further that one of the generators seized was uplifted by the Sheriff of Zambia and placed in their physical custody whilst the other generator was removed from the premises at the time by unknown persons despite it being under seizure by the sheriff of Zambia. That it later came to be discovered that the other generator was removed from the premises by Mr Simeza and on 26th August, 2020, after a notice was put up in the Zambia Daily Mail newspaper, at the instance of Mr Simeza, through Blitz Consultants Limited, a registered auctioneer, regarding a public auction sale by Mr Simeza, of the goods of the defendant including the goods seized by the Sheriff by walking possession. It was also deposed that the plaintiff obtained a stay of the said sale from this honourable Court on 28th August, 2020, pending the hearing of contempt proceedings against Mr Simeza.

The plaintiff deposed that Mr Simeza has since issued an application for an order to set aside the writ of summons and default judgment in this action which application was made on 3rd September, 2020, and that it was from the said application that it was revealed and since came to the plaintiff's knowledge that the defendant company was subject of Business Rescue Proceedings commenced on 2nd October, 2018. The plaintiff deposed that prior

to the commencement of these proceedings, a search was conducted at the Patents and Companies Registration Agency (PACRA) which search showed that the defendant was not under either Business Rescue, Liquidation or Receivership. That a physical search was also conducted at PACRA but that the record did not show any evidence of a notice being filed by the Business Rescue Administrator as shown by exhibit marked "JG2".

The plaintiff deposed that he has been advised by his advocates and believes it to be true that the company is currently under Business Rescue Proceedings and not under a Receivership. The plaintiff craved the indulgence of this Court to determine whether Mr Simeza is competent and has capacity to bring the aforementioned application as Receiver and Manager of the defendant when the defendant company is under Business Rescue Proceedings. That he was desirous of obtaining an order to dismiss Mr Simeza's application to set aside writ of summons and default judgment obtained.

On the other hand, an affidavit in opposition was filed on 27th November, 2020, deposed to by one Robert Mbonani Simeza, the Receiver and Manager of the defendant herein. He deposed that he was appointed Receiver and Manager of the defendant on 22nd

November, 2019, as shown by exhibit marked "RMS1". He went on to depose that from the records in his possession, the defendant was placed under Business Rescue in the proceedings under cause 2018/HPC/0412 sometime in 2018, and one Mr Luwita Sayila was appointed Business Rescue Administrator of the defendant which the plaintiff knew, having been Director of Human Resource until 30th October, 2019.

It was also deposed that the Business Rescue Proceedings were extended for a further 3 months by Order made on 9th December, 2019, under the same cause. Mr Simeza deposed that the defendant is currently in receivership following his appointment in November, 2019.

It was deposed further that on 22nd October, 2019, the plaintiff proceeded to enter judgment in default of appearance and defence for the sum claimed and that on 7th November, 2019, the plaintiff proceeded to issue a writ of fifa. He deposed further that on 21st November, 2019, the sheriff seized some of the goods charged by the defendant to Stanbic Bank Zambia Limited. The deponent went on to state that after his appointment as Receiver of the defendant company on 22nd November, 2019, he proceeded to secure all the charged assets of the company under the floating debenture which

assets included the Cummins 350KVA generators as shown by exhibit marked "RMS4". The deponent stated that his primary duty as Receiver was to secure the assets charged under the debenture and to realise those assets for the benefit of the preferential and secured creditors and thereafter unsecured creditors like the plaintiff herein.

It was also deposed that on 4th October, 2020, the plaintiff commenced this action and that on 28th August, 2020, a search was conducted on the Court file in the matter, which revealed that the plaintiff commenced this action without obtaining leave of Court to commence an action against a company under Business Rescue. It was further deposed that the plaintiff did not obtain any written consent from the Business Rescue Administrator to commence these proceedings.

In response, the plaintiff filed an affidavit in reply dated 14th December, 2020, in which he deposed that he disputes the statement that Mr Simeza has capacity to depose to any documentation on behalf of the defendant or act on behalf of the defendant in this action. The plaintiff deposed further that he was not aware of any Business Rescue Proceedings as he was never notified of such proceedings despite being a creditor of the

defendant company. The plaintiff went on to depose that he tendered his letter of resignation from the defendant company on 16th July, 2017, which resignation was to be effective on 30th October, 2017, and not October, 2018. That his letter was duly acknowledged by the defendant on 22nd September, 2017, as shown by exhibit marked "JG1" in the affidavit in reply.

The plaintiff disputed the allegation that the defendant is currently under Receivership as the Business Rescue Administrator is still in effect and the Business Rescue Administrator has not ceased to act as Business Rescue Administrator nor has he terminated such appointment as envisaged by the law. That the Business Rescue Administrator further acknowledges that Mr Simeza is fully aware of the fact that the Business Rescue Administrator's appointment is still effective as shown by copy of an email exhibited and marked "JG2". He went on to depose that contrary to the contents of paragraph 8 in the affidavit in opposition, he commenced an action against the defendant on 4th October, 2019, and not 4th October, 2020, as the record of this Court will show.

The plaintiff deposed that he has been advised by his advocates and believes it to be true that a company under Business Rescue cannot be in Receivership. He added that he has been advised by

his advocates and believes it to be true that any challenge as regards the commencement of this action ought to be made by the Business Rescue Administrator as the defendant is under Business Rescue until properly terminated as required by the law.

When the matter came up for hearing on 6th November, 2020, the Court ordered the parties to file written submissions.

Counsel for the plaintiff filed the plaintiff's skeleton arguments in support of affidavit in support of notice of motion for determination of preliminary issues on 25th September, 2020. The gist of the arguments therein were that Mr Simeza does not have a right to be heard in this matter in any capacity on behalf of the defendant company as he does not have locus standi. This contention was based on the argument that a company under Business Rescue cannot be under Receivership. Counsel submitted that Business Rescue Proceedings and Receivership proceedings are two different insolvency proceedings which processes cannot be applied at the same time in respect of the same company. To substantiate his submissions, Counsel referred the Court to the learned authors **Stephen Griffin et al in the book Company Law; Fundamental Principles 4th Edition (2006)** at page 275 which explained the

interaction between Administrative receivership and Administration in the following terms:

> ***"These two procedures are mutually exclusive. A company can be in either administrative receivership or administration; it cannot enter both at the same time, and it would be almost impossible to conceive of a scenario whereby a company may enter these two procedures sequentially."***

Counsel also cited learned author **Brenda Hannigan in her book Company Law 3rd Edition (2012)** at page 591 as follows:

> ***"Once an administration order is made, no administrative receiver may then be appointed (Sch B1, para 41(1)). These are mutually exclusive procedures and a company can be in administrative receivership or administration but it cannot be in both at the same time."***

Counsel concluded that the Receiver does not have any power to take any action on behalf of the defendant company as the company is currently under Business Rescue and that Mr Simeza therefore does not have the right to be heard, for and on behalf of the defendant.

On the other hand, Counsel for the defendant filed skeleton arguments in opposition to notice of motion on 27th November, 2020. The gist of the submissions were that the questions of law raised by the plaintiff in the notice of motion are not suitable for

determination Under Order 14A and Order 33 Rules 3 and 7 of the RSC. That Order 14A of the RSC requires that a party wishing to have a question of law determined ought to ensure that the defendant has given a notice of intention to defend. It was submitted that the record will show that the plaintiff entered judgment in default of appearance and defence meaning that the defendant has not entered appearance and filed any defence to satisfy this requirement.

Counsel contended further that the court has no jurisdiction to determine the application under Order 33 because the application does not fulfil the mandatory requirement under Order 14A of the RSC as per the case of **African Banking Corporation v Mubende Country Lodge Limited Appeal No.116/2016**[1] where the Supreme Court stated that Order 33, rule 3 cannot be invoked independently or to the exclusion of the mandatory requirements of Order 14A, RSC which require the filing of a notice of intention to defend as a pre-requisite to raising a preliminary point of law.

In relation to Section13 of the High Court Act, Counsel for the defendant contended that the plaintiff has relied on Section 13 of the High Court Act without demonstrating, in the arguments, the nexus between the said Rule and the application. Counsel

submitted that Section 13 cannot be the basis upon which the plaintiff can raise its application for the determination of preliminary issues and have the court determine the said issues. In concluding this part, Counsel submitted that the plaintiff's application for the determination of preliminary issues be set aside for being irregular.

In relation to the Receiver's locus standi in this matter, Counsel contended that the appointment of the Receiver and subsequent application to set aside the writ of summons and default judgment and to restore the goods seized in execution to the defendant was merited. Counsel cited the case of **Re London Pressed Hinge Company Ltd v London Pressed Hinge Company Ltd [1905] 1Ch. 576**[2] and submitted that the Court therein held that a debenture holder who has a floating security upon the undertaking and all the property, present and future, of the company, is entitled to the appointment of a Receiver of the property subject of the debenture if their security is in jeopardy. Counsel submitted that the series of events as shown on record, jeopardized the defendant's assets in that they were in danger of being seized and were in fact seized. That the issuance of the writ of fifa and seizure

triggered the Bank's right to appoint the Receiver as was done pursuant to the debenture.

It was also submitted that the plaintiff's application to raise and determine the preliminary issue regarding the validity of the appointment of a Receiver is a cause of action that cannot be determined in these proceedings. That a perusal of the writ of summons and statement of claim shows that there is no claim of any sort that relates to the validity of the appointment of the Receiver. It was Counsel's contention that if the plaintiff seeks to challenge the validity of the appointment of the Receiver, he needs to commence a fresh action to do so, as he cannot challenge the validity of the appointment of the Receiver through the application to raise and determine preliminary issues when no such issue is before court. That the determination of whether the Receiver was validly appointed will result in the court making a substantive determination on an interlocutory application over an issue that is not in dispute between the parties.

In reply, Counsel for the plaintiff filed skeleton arguments in reply on 14th December, 2020. It was submitted that the central issue brought to light by the plaintiff relates to the capacity of the Receiver to move the Court in any respect in this matter when

there is a Business Rescue Administrator. He submitted that it has not been disputed by the Receiver that the defendant company is under Business Rescue and that a Business Rescue Administrator was appointed.

Counsel also contended that from a perusal of the skeleton arguments in opposition, there is a clear misapprehension of the central issue brought before this court for determination and that this issue raised has not been fully addressed by Counsel for the defendant.

It was Counsel's further submission that the misapprehension is further demonstrated by the contention made in the skeleton arguments in opposition that the writ of summons and statement of claim filed by the plaintiff does not reveal a claim challenging the validity of an appointment as Receiver. Counsel submitted that the submissions are irrelevant and inapplicable to the current application as the Receiver was appointed sometime in November, 2019, which is sometime after judgment had been obtained and the said judgment executed. That it was therefore factually impossible for the plaintiff to have challenged an appointment that did not exist at commencement.

In relation to the power of the Court to determine issues raised by the plaintiff, Counsel submitted that the Court has sufficient power to determine the questions raised on a point of law and further grant an Order to dismiss the Receiver's application to set aside writ of summons and statement of claim. That in the event that the Court finds that Orders 14A and 33 RSC are inappropriate provisions in this action, Section 13 of the High Court Act provides the Court with the power to administer law and equity concurrently and therefore empowers the Court to grant any relief necessary for the dispensation of justice and this includes determining a preliminary issue on a point of law. Counsel made reference to the case of **Finsbury Investment Limited v Antonio Ventriglia and Others (Selected Judgment No.42 of 2016)[3].**

In addition, Counsel submitted that the Court has inherent jurisdiction Under Order 3 Rule 2 of the HCR to grant the plaintiff's relief that the Receiver's application to strike out writ of summons and statement of claim be dismissed with costs to the plaintiff.

I have carefully considered the affidavit evidence as well as the submissions, both oral and written, made by learned Counsel from both sides.

Section 13 of the High Court Act provides as follows:

> ***"In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."***

In the case of **Finsbury Investments Limited v Ventriglia and Others** at J24-J25 the Supreme Court stated that:

> **"It is our firm view that the jurisdiction of the High Court as prescribed in the manner the High Court Rules are couched and by the portion of section 13 we have reproduced in the preceding paragraph is wide enough to include an interlocutory application to strike out a Petition for winding-up, such as the one that confronted the Learned High Court Judge. This can be discerned from the explanation we have given of the effect of the High Court Rules and the wording of the section which is very wide and all encompassing.**
>
> **The procedure and practice we have outlined in the preceding paragraph is applicable to all matters before the High Court without exemption. As such there was no misdirection on the part of the Learned High Court Judge when she found that the High Court possesses inherent**

jurisdiction to entertain an application to dismiss a petition at interlocutory stage."

In light of the Finsbury case cited above and indeed pursuant to Order 3 Rule 2 of the HCR, which provides that:

> ***"Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."***

I am of the considered view that I have inherent jurisdiction to entertain this application. I will therefore proceed to determine the issues raised in casu.

I will briefly discuss Business Rescue Proceedings as they relate to the case in casu before narrowing down on the issues raised. Part III of the Corporate Insolvency Act No.9 of 2017 (Corporate Insolvency Act, 2017) introduced a business rescue regime. According to the Report of the Committee on National Economy, Trade and Labour Matters on the Corporate Insolvency Bill, N.A.B. No. 9 of 2017, for the Second Session of the Twelfth National Assembly Appointed on Wednesday, 20th September, 2017, it was stated as follows at page 9 of the Report:

> **"Your Committee notes that among the new provisions in the Bill are provisions on Business Rescue Proceedings provided for in Part III. This is progressive because the**

focus of corporate insolvency hitherto has been to bring the business of companies in financial distress to an end. Such an approach has serious ramifications for the country's economy. While agreeing with the stakeholders, your committee is of the view that liquidation must be the last option and only resorted to in exceptional circumstances. Your Committee, therefore, recommends that in terms of the structure, the Part dealing with Business Rescue Proceedings should precede that dealing with Receivership."

In the case of **Chimanga Changa Limited v Export Trading Limited Appeal No 76/2020**[4] the Court of Appeal stated as follows at J13:

> ***"Business Rescue has the objective to offer the best benefits to all its creditors regardless of status. The above stated objective is supported by a general moratorium which temporarily gives breathing space to the company from any legal proceeding by a claimant owed by the company."***

The Court of Appeal went on to state at J19 that:

> ***"We note from the arguments proffered by the Appellant that an analogy is sought to be drawn between Receivership and Business Rescue Proceedings. We however, wish to state that the two are not analogous both in nature and procedure. It must also be stated that the rescue culture was adopted in the United Kingdom under the Enterprise Act 2002 as a way of escaping the receivership regime which was not friendly to business as it is tilted more in favour of a secured creditor mostly a debenture holder."***

The learned author, **Brenda Hannigan, in the book Company Law, 3rd Edition, Oxford University Press, 2012**, at page 577 paragraph 23-1 states that:

> ***"The origins of administration lie in the recommendation of the Cork Committee on Insolvency Law that provision should be made to enable a person called an administrator to be appointed to an insolvent but potentially viable company with all the powers normally conferred upon a receiver and manager under a floating charge including power to carry on the business of the company and to borrow for the purpose. The intention was to provide a breathing-space, free from the pressure of Creditors' claims, which would enable the administrator to consider whether the business could be rescued and/or to negotiate with creditors regarding any possible arrangement or compromise of the company's debts."***

It should be noted however that administration has evolved in a different way to that envisaged by the Cork Committee. According to Hannigan, Supra, at paragraph 23-2, administration was introduced by the Insolvency Act 1985 and consolidated in the Insolvency Act, 1986, before being entirely recast and reformed by the Enterprise Act 2002 in UK.

At page 578 paragraph 23-4, Hannigan states that:

> ***"It was therefore decided that administrative receivership should cease to be a major Insolvency procedure and there should be a statutory restriction on the right to appoint an administrative receiver (other than with respect to certain transactions in the capital markets)... overall, the government believed that the***

result would be a procedure which would be as flexible and cost-effective as administrative receivership, but with an administrator owing a duty to act in the interests of all creditors, with unsecured creditors having an opportunity for input and participation and the process being subject to the oversight and direction of the court in a public and transparent way."

The purpose of administration was spelt out in the Insolvency Act 1986, Schedule B1 paragraph 3 (1) in UK. It provided that the administrator of a company must perform his functions with the objective of rescuing the company as a going concern; or achieving a better result for the company's creditors as a whole than would be likely if the company were wound up, without first being in administration, or realising property in order to make a distribution to one or more secured or preferential creditors. The Corporate Insolvency Act, 2017, has a similar provision in Section 21 (1) (b).

As can be seen from the quotations cited above, one of the aims of administration is to have the Administrator act in the interest of all creditors of the company as opposed to some creditors only.

Section 2 of the Corporate Insolvency Act, 2017, defines Business Rescue Proceedings as:

"The process of facilitating the rehabilitation of a company that is financially distressed by providing for

(a) the temporary supervision of the company and management of its affairs, business and property;

(b) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; or

(c) the development and implementation, if approved in accordance with this Act, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result if the company was to be liquidated."

The first and second issues raised are whether Mr Simeza has locus standi to bring an application on behalf of the defendant company which is subject to Business Rescue Proceedings; and whether Mr Simeza has the capacity to act on behalf of the defendant as a result of his appointment as Receiver by the defendant which has an all asset floating charge on it's assets.

The record will show that both Mr Simeza and the plaintiff deposed and acknowledged that the defendant was placed under Business Rescue Proceedings and that there was an Administrator in place.

Brenda Hannigan, Supra, at page 591, paragraphs 23-40, states that:

"once an administration order is made, no administrative receiver may then be appointed (Sch B1, para. 41(1)). These are mutually exclusive procedures and a company can be in administrative receivership or

administration but it cannot be in both at the same time. (See IA 1986, Sch B1, para. 17(b), 25 (c))"

The learned author, **Stephen Griffin, in the book Company Law, Fundamental Principles, 4th Edition, Pearson Education, 2006**, at page 275 also states that the interaction between administrative receivership and administration is that:

> ***"These two procedures are mutually exclusive. A company can be in either administrative receivership or administration; it cannot enter both at the same time, and it would be almost impossible to conceive of a scenario whereby a company may enter these two procedures sequentially."***

The learned author, **Roy Goode, in the book Principles of Corporate Insolvency Law, 4th Edition, 2011**, at page 335, at paragraph 10-27, states that:

> ***"The effect of the Insolvency Act is that an administrative receiver and an administrator cannot be in post at the same time. The reason for such a rule is obvious: since both are given the widest powers of management but represent different interests, it is not possible for their functions to be exercised concurrently."***

In this case, the record shows that the defendant was placed under Business Rescue Proceedings in 2018, and the same was extended on 9th December, 2019. This means at the time the plaintiff was

commencing this action on 4th October, 2019, the defendant herein was already subject of Business Rescue Proceedings. I would just like to state at this point that in the affidavit in support of this application, the plaintiff exhibited a search print out from PACRA dated 4th October, 2019, which is the date this action was commenced and that search print out did not show any evidence of the defendant being subject of Business Rescue Proceedings. I note that Mr Simeza deposed that the plaintiff knew that the defendant was under Business Rescue Proceedings because he was director of human resource until 30th October, 2019.

The record also shows that Mr Simeza was appointed Receiver of the defendant company on 22nd November, 2019, this was way after the defendant company was placed under business rescue proceedings and after an Administrator had already been appointed. As seen hereinbefore, once an administration order is made, no administrative receiver may then be appointed. It seems however, that there are certain instances when the two can be in post, at the same time. **Brenda Hannigan, Supra, at page 591, paragraph 23-39**, states that:

> ***"If the company is already in administrative receivership, the court must dismiss an administration application in respect of the company unless the person***

by or on behalf of whom the receiver was appointed consents to the making of an administration order, or the security under which the receiver is appointed would be liable to be released or discharged or avoided under various provisions."

The courts will only uphold an automatic crystallisation clause as valid, if the event giving rise to it are clearly drafted in the document or charge, such as is the case in casu.

Automatic crystallisation affects third parties who are outsiders to the agreement between the charger and chargee who can agree on events that will automatically crystallise the charge.

Most banks have the floating charge as security because of the flexibility that it exhibits, namely that it hovers or floats until a crystallising event takes place.

Execution creditors have also suffered due to the negative impact of automatic crystallisation on their rights because automatic crystallisation can take place before they complete the execution process of their judgment against the debtor company. It has been submitted that the reason for this stems from the refusal of the courts to recognise that the delivery of a writ of fifa to the sheriff confers a right in rem on the execution creditor so as to give him priority over an uncrystallised charge. (Refer to D. Hare and D.

Milman, Debenture holders and judgment creditors – problems of priority (1982) 1 LMCLQ 57, at 60.

One of the main functions of the Receiver is to protect the interests of the chargee by taking possession of property which is subject to the charge. A Receiver can be appointed by court or outside court such as is the case with Mr. Simeza who was appointed by Stanbic bank.

It is important to note that the Corporate Insolvency Act No. 9 of 2017, provides for a general moratorium on legal proceedings against a company in corporate rescue, except inter alia, with the written consent of the business rescue administrator or with leave of court.

It must be pointed out, however that corporate rescues can only succeed if the creditors remain patient otherwise, if they decide to execute their rights, the Receiver will have to resort to a moratorium being imposed by the court as is the case in other commonwealth jurisdictions. In England and other jurisdictions, the creation of a moratorium will still not be enough if the creditors persist with the enforcement of their security.

Mr Simeza mentioned in his affidavit in opposition that on 21st November, 2019, the sheriff seized some of the goods charged by the defendant to Stanbic Bank Zambia Limited and that after his appointment as Receiver of the defendant company on 22nd November, 2019, he proceeded to secure all the charged assets of the company under the floating charge or debenture which included the Cummins 350KVA generators as shown by exhibit "RMS4". Mr Simeza further deposed that his primary duty was to realise these assets for the benefit of the preferential and secured creditors and thereafter unsecured creditors like the plaintiff herein.

Corporate rescues are perceived as a way of preserving jobs for the company employees and this is a very important area in recent times and courts take cognisance of that fact. (See Re Welfare Engineers Ltd (1990) 1 BCLC 250).

The aim of the Receiver in the long run is to achieve what the directors of the company failed to achieve namely; he has to carry out his duties in a professional manner with a view to fulfilling the purpose of his appointment. It is important to note that the Receiver is in a very cumbersome position because of the ailing company and he has to do his very best to make it survive.

It is submitted further, in the defendant's skeleton arguments that on 22nd November, 2019, the Stanbic Bank Zambia Limited placed the defendant company under receivership following the exit of the Business Rescue Administrator. That on 21st November, 2019, bailiffs took walking possession of goods belonging to the defendant following the fifa issued by the plaintiff.

The Defendant therefore, brought this application to challenge the propriety of the plaintiff's court process and the default judgment. That no leave was obtained from court by the plaintiff to institute these legal proceedings against the defendant nor is there evidence on record to show that the written consent of the Business Rescue Administrator was obtained pursuant to section 25 (1) (a) of the Corporate Insolvency Act.

Failure by the plaintiff to comply with the provisions of section 25 (1) (a) (b) of the Corporate Insolvency Act, restricts this court's jurisdiction in terms of proceeding with the plaintiff's claims before this court. I therefore concur with the Learned Counsel for the defendant company that the plaintiff would have to start a fresh action in order to question the locus stand of the appointed Receiver of the defendant company, Mr Simeza.

I accordingly dismiss the plaintiff's application with costs to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka the 7th **day of** March**, 2022**

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Elita Phiri Mwikisa
JUDGE