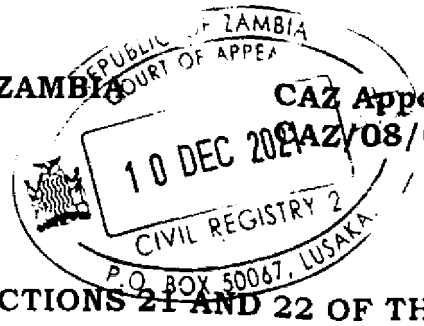
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)



CAZ Appeal No. 053/2021
CAZ/08/031/2021

IN THE MATTER OF: **SECTIONS 21 AND 22 OF THE CORPORATE INSOLVENCY ACT No. 9 OF 2017**

AND

IN THE MATTER OF: **ORDER 30 RULE 11 OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA**

BETWEEN:

CHIMANGA CHANGA LIMITED **APPELLANT**

AND

EXPORT TRADING LIMITED **RESPONDENT**

CORAM : Kondolo, Chishimba and Ngulube JJAs
On 25th August, 2021 and 10th December, 2021

For the Appellants : Mr. M. Mwanza of Messrs. J & M Advocates
For the Respondents: Ms. K. Tembo of Messrs. Milner & Paul Legal Practitioners.

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASES REFERRED TO:

1) Standard Bank of South Africa Limited v C and E Engineering (Pty) Limited Gauteng Local Division, Johannesburg – Case No. 16611/20

2) Oakdene Square Properties (Pty) Limited & Others v Farm Bothasfontein (Kyalami) (Pty) Limited & Others 2013 (4) SA 539 (SCA)
3) Anderson Mazoka & Others v Levy Mwanawasa & Others (2005) ZR 138
4) Chainama Hotels Limited v Investrust Merchant Bank (Z) Limited SCZ Appeal No. 105/2009
5) Zambia Telecommunications Company Limited v Mulwanda & Ngandwe SCZ Judgment No. 7 of 2012
6) Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172
7) Nkhata & Others v The Attorney General (1966) ZR 124
8) Khalid Mohamed v The Attorney-General (1982) Z.R. 49
9) C & S Investments Limited, Ace Car Hire Limited, Sunday Maluba v The Attorney General (2004) Z.R. 216
10) Ridge v Baldwin (1946) AC 40
11) R v Commission For Racial Equality Ex-parte Hillingdon London BC (1982) AC 779
12) Attorney General v Marcus Achiume (1983) ZR 1
13) Kitwe City Council v William Ng'uni (2005) ZR 57
14) Practice Note (Insolvency: Administration order: Independent report) (1994) 1 All ER 324

LEGISLATION CITED:

1. The Corporate Insolvency Act No. 9 of 2017 of the Laws of Zambia.
2. The Supreme Court Practice 1999 Edition
3. The High Court Rules, Chapter 27 of the Laws of Zambia

OTHER WORKS REFERRED TO:

1. Halsbury's Laws of England. 7(3). 4th edition. 1996 Re-issue. London. Butterworths

1.0 INTRODUCTION

1.1 This appeal is against the judgment delivered by Hon. Mr. Justice Kazimbe Chenda dated 27th January, 2021 in which he

set aside the company's resolution and discharged the appointment of the business rescue administrator by the appellant. The appeal deals with business rescue proceedings and the circumstances under which a resolution to commence business rescue proceedings may be set aside by the court. It also addresses the relevant provisions of section 21 and 22 of C/A and the setting aside of the appointment of a business rescue administrators failure to serve on all affected parties.

2.0 **BACKGROUND**

2.1 The appellant and respondent were in a contractual-business relationship of recipient and supplier of maize respectively. In the course of this relationship, the respondent supplied the appellant with 3, 196, 379 metric tons of white maize worth K9, 032, 713.05. Having failed to pay for the supplied maize, the respondent commenced an action under **Cause No. 2017/HPC/0433** in which, among other reliefs, it sought payment of the amount due on a quantum meruit for the value of the metric tons of maize delivered.

2.2 Judge Irene Zeko Mbewe heard the matter and in a judgment dated 21st August, 2019, entered judgment in favour of the respondent. The appellant subsequently appealed to this court under **Cause No. CAZ/08/260/2019.** Suffice to state that the said appeal is not relevant to the appeal herein.

2.3 Whilst the above appeal was pending, the appellant commenced **Business Rescue Proceedings (BRP)** pursuant to the provisions of **The Corporate Insolvency Act No. 9 of 2017 (the CIA)**. The BRP commenced following a shareholders' special resolution dated 20th September, 2019 which was based on a board resolution dated 16th September, 2019. This was followed by an advertisement in the press dated 4th September, 2019 of the notice of the resolution and appointment of one Mando Mwitumwa, as Business Rescue Administrator (BRA).

2.4 On 10th December, 2019, the respondent issued originating summons against the appellant under **Cause No. 2019/HPC/0555,** which is the subject of this appeal, seeking the following reliefs:

(2) An order to set aside business rescue proceedings instituted by the appellant;

(3) An order to set aside the appointment of the business rescue administrator;

(4) An order for the interpretation of sections 21 and 22 of the CIA as regards breach of the said provisions;

(5) Further or other reliefs as the court may deem fit;

(6) Interest and costs of and incidental to the action.

3.0 ARGUMENTS BEFORE THE HIGH COURT

3.1 In its skeleton arguments in support of originating summons, the respondent referred to the provisions of **sections 21 and 22 of the CIA**. It was contended that the appellant had failed and/or neglected to comply with the mandatory provisions of the law in instituting the BRP and that the same, should be set aside. The respondent advanced three basis for the court to set aside the BRP.

3.2 The first being that, contrary to **section 21(1) of the CIA**, the appellant had commenced the BRP by way of a board resolution as opposed to a special resolution. That the resolution exhibited in the affidavit in support marked "AD19" at page 77 of the record appeal is not a special resolution but appears to be an ordinary resolution.

3.3 The second basis being that in terms of **section 21(2)(b) of the CIA**, the effective date of the resolution is the date on which the resolution is filed with the Registrar. However, exhibit "AD19" shows that it was filed on 25th September, 2019 at the Patents and Companies Registration Agency (PACRA) and that this marked the effective date of the BRP. The appellant ought to have given notice of the special resolution and its effective date to every affected person, including the respondent, by way of proper notices within 30 days after filing the said resolution but did not do so. Instead, the appellant issued the notice via newspaper advertisement, which the respondent argued, was outside the stipulated 30 day period as the said advertisement was published on 31st October, 2019.

3.4 Further, that the appointment of the Business Rescue Administrator (BRA) was supposed to be made after filing of the special resolution. Instead the appointment was made on 20th September, 2019, when the shareholders held their meeting. This was prematurely done. The said resolution was filed on 25th September, 2019 at PACRA.

3.5 The respondent therefore contended that the resolution appointing Mando Mwitumwa as BRA was highly irregular and invalid in that the said appointment was made before the resolution to commence the BRP was filed and before it became effective.

3.6 In the third instance, the respondent contended that the appellant was in breach of **section 21(4) of the CIA** when it neglected and/or failed to file a notice with the Registrar of the appointment of the BRA within seven days of the appointment as well as publishing a copy thereof to each affected person within 21 days. Reference was made to the exhibit marked "AD/11" attached to the affidavit in support of originating summons at page 81 of the record of appeal, namely the Notice of Appointment as Receiver, Liquidator or Business Rescue Administrator, filed on 25th September, 2019 alleged to been filed outside the requisite 7 days of the making of the appointment. Further that there was also no publication of a copy of the notice of appointment within 21 days after the filing of the notice.

3.7 The appellant opposed the application and filed skeleton arguments to that effect. It was submitted that **section 22(3)(a) of the CIA**, outlines the steps an 'affected party' must take when they seek to challenge BRP. It was contended that the respondent had not served a copy of its application on the company nor the official receiver, which breach is fatal to the application as the court has no discretion to overlook the failure. This is because **section 22(3)(a)** is couched in mandatory terms.

3.8 It was further contended that there was no proof, in terms of **section 22(3)(b) of the CIA**, that the respondent, as an 'interested party', had notified all other affected parties of the existence of the application. This too was contended to be fatal to the application as there was no affidavit of service to that effect.

3.9 The appellant submitted in the court below that the application to set aside the BRP is based on a misapprehension of facts, speculation and suppositions. With respect to the special resolution and appointment of the BRA, the appellant contended that the respondent had misapprehended the facts

in its affidavit in support in relation to the advertisement of the first notice in the New Vision Newspaper. It was submitted that the advertisement, issued on 9th October, 2019, was well within the 30 days and 21 days period required under **sections 21(3) and (4) respectively, of the CIA**. The advertisement in the Times appearing on the Zambia of 31st October, 2019 was merely a follow up.

3.10 As to whether the members' special resolution to commence BRP is irregular and that the appointment of a BRA cannot be done simultaneously with commencement of BRP, it was submitted that **section 21(3) of the CIA** clearly states that the appointment of a BRA must be done within 30 days after the filing of the resolution by the board. It was submitted that the use of the word *"within"* as opposed to *"after"* in the statute means that the filing of both the resolution and appointment of the BRA can be done on the same day because that qualifies as being done on the same day and under the same resolution.

3.11 In any event, it was contended that the penalty for breach of **section 21(3) and (4) of the CIA** as provided in **section 21(5),** does not come within the prayers sought by the respondent.

3.12 As regards the issue of lack of service on the respondent of the notice in the prescribed form and the argument that the advertisement therefore amounted to insufficient service, the appellant contended that the prescribed forms have not been promulgated. Thus, the relief sought is non-existent as there is a lacuna in the law. Therefore, the publication of the notice in a newspaper of wide circulation, being standard form, was sufficient.

4.0 **DECISION OF THE HIGH COURT**

4.1 Judge Chenda considered the competing position/arguments by the parties and was of the view that the issues for determination were as follows;

(i) The procedure for validly taking out voluntary BRP; and

(ii) Whether the appellant had adhered to the said procedure.

4.2 As regards the procedure for commencing a voluntary BRP, the lower court considered the provisions of **section 21(1) of the CIA** which prescribes an objective mandatory threshold of criteria to be met involving two tiers of a corporate entity,

namely, the board of directors as instigators, and the body of members or shareholders, as the consummators.

4.3 The CIA being silent on the yardstick for measuring when this threshold is reached to legitimize the special resolution, the court below turned to the reasoning of the South African High Court in **Standard Bank of South Africa Limited v C and E Engineering (Pty) Limited** [1] where it was stated thus:

> ***"Business rescue is aimed at the rehabilitation of a company in financial distress –***
> ***As the SCA explained in Oakdene [2], a company does not have to establish a reasonable probability that it can be rescued. It is required only to establish a reasonable prospect, which entails a lower bar. However, it requires more than a mere prima facie case or an arguable possibility. It must be based on reasonable grounds, and not speculation. The company does not have to set out a detailed plan as to how the rehabilitation might take place. However, it must establish grounds, i.e. facts that would show that there is a reasonable prospect of either of the two goals cited above being met."***

4.4 The lower court considered **section 21(2)(b) of the CIA**, and held that a resolution to commence BRP takes effect after it has been filed with the Registrar of PACRA. Thereafter, there has to be the publication of a notice of the proceedings and

appointment of a BRA within 30 days after the filing of the resolution. In terms of **section 21(3) and (4) of the CIA**, thirty days after the filing of the resolution, the company must give notice of the resolution and its effective date to every affected person; appoint a BRA and file a notice of the said appointment with the Registrar within seven business days of making the appointment; and publish a copy of the notice of appointment of the BRA to each affected person within 21 business days after the notice is filed. According to **section 21(5)**, the failure to give the said notice causes the root resolution for voluntary BRP to lapse.

4.5 In determining what BRP are, the court below considered **section 2(1) of the CIA** and applied the primary rule of interpretation of statutes espoused in **Anderson Mazoka & Others v Levy Mwanawasa & Others** [3] that words should be given their ordinary grammatical and natural meaning, and reasoned that the process of voluntary BRP can only be said to have validly began where:

(i) The board has demonstrated to the members/shareholders a belief founded on reasonable

grounds (i.e. facts not speculation) that the circumstances in **section 21(1)(a) and (b) of the CIA** exist;

(ii) The board has shown to the members/shareholders that there is need to achieve one of the of the alternative outcomes in **section 21(1)(i) - (iii) of the CIA**;

(iii) Based on the above representations from the board, the members/shareholders of a company have passed a special resolution pursuant to **section 21(1) of the CIA**; and

(iv) The special resolution has been filed with the Registrar of PACRA as per **section 21(2)(b) of the CIA** upon which the voluntary BRP take effect.

4.6 The learned Judge further held that the BRP can lapse if there is a failure to notify the affected persons of the commencement of the proceedings; appointment of the BRA after the BRP have taken effect; and failure to give notice to PACRA and affected persons of the appointment of the BRA.

4.7 As regards the issue of whether the appellant followed due process, the lower court found that a special resolution of the appellant was passed on 20th September, 2019 and a board resolution on 16th September, 2019 followed by the publicizing of the event through a newspaper advertisement. In applying the case of **Chainama Hotels Limited v Investrust Merchant Bank (Z) Limited** [4], the court below found that the advertisement of the resolution and appointment of the BRA cast the net wide enough to capture as many interested persons as possible and satisfied the notice requirement under **section 21(3) and (4) of the CIA**.

4.8 In view of the existence of a colossal judgment debt in Cause No. 2017/HPC/0433, the lower court was satisfied that the appellant was financially distressed as alluded to in the board resolution. As regards the issue of reasonable prospects of rescuing the entity, the learned Judge considered the earlier cited case of **Standard Bank of South Africa Limited v C and E Engineering (Pty) Limited** [1] and held that there was no basis in the BRP foundation documents to conclude that there

appeared to be reasonable prospects of rehabilitating the respondent.

4.9 This view was informed by the fact that the board resolution neither made a pitch nor alluded to the shareholders that there appeared to be reasonable prospects of rehabilitating the appellant company. Consequently, the learned Judge found that the mandatory provisions of **section 21(1)(b)** were not met by the appellant, and accordingly set aside the resolution pursuant to **section 22(1)(a)(ii) and (iii) of the CIA**.

4.10 As the appointment of the BRA was prematurely done on 20th September, 2019 before the commencement of the BRP through the PACRA filing done on 25th September, 2019, the lower court could not invoke its powers under **section 22(5)(b)(ii) of the CIA** to direct the BRA to render a report as to whether there are reasonable prospects of rehabilitating the appellant, and if so allow the BRP to continue.

4.11 Further, the court below held that more than 60 days having passed since the shareholders' resolution of 20th September, 2019 without compliance with **section 21(3)(b)**, it followed that

the resolution had lapsed by operation of **section 21(5)(a)** and that **section 21(5)(b) of the CIA** had taken effect.

4.12 The court proceeded to set aside the resolution by the appellant's shareholders dated 20th September, 2019 and discharged the appointment of the BRA by the appellant with costs to be taxed in default of agreement.

4.13 **GROUNDS OF APPEAL**

4.14 Dissatisfied with the decision of the above, the appellant has raised four grounds of appeal couched as follows:

1) ***The learned High Court Judge erred in fact when, in deciding about the issue of reasonable prospects of rescuing the appellant, he stated on page J14 of his judgment that: "even the Respondent's (appellant herein) affidavit in opposition to originating summons does not in any way allude to any such prospects", when in fact the Appellant's affidavit alluded to the said prospects of rescuing the Appellant as per paragraph 15.1 which the Judge overlooked;***
2) ***The learned High Court Judge misdirected himself when deciding the issue of compliance with section 21 and 22 of the Corporate Insolvency Act, 2017, and he failed to properly address his mind to the fact that the applicant had not met the legal prerequisites he glossed over the incompetencies in the applicant's claim and failed to pronounce himself on whether the respondent herein was also in compliance with the provisions of section 22(3) of the Corporate Insolvency Act and whether the High Court Judge had jurisdiction to hear the matter when the respondent did not***

comply with the provisions of section 22(3). The judgment of the learned High Court Judge effectively rendered a decision that was one sided as regards the interpretation of section 21 and 22 of the Corporate Insolvency Act which was an injustice to the appellant herein;

3) *The learned High Court Judge erred in law and in fact when he failed to address his mind to the respondent's arguments on the efficacy of the provisions of section 22(3) of the Corporate Insolvency Act, 2017 as regards the actions of the respondent herein of not serving a copy of the originating process on the official receiver and on all affected parties of the business rescue proceedings; and*

4) *The learned High Court Judge erred in law and in fact when he failed to address his mind to the fact that the affected parties of the business rescue proceedings were not informed of the action in the lower court and hence could not be part of the court proceedings as a result this curtailed the rights of the affected parties to be heard, and rendered the applicant's claim incompetent.*

5.0 APPELLANT'S ARGUMENTS

5.1 The appellant filed heads of arguments dated 26th March, 2021. In ground one, the appellant submits that the finding by the court below that its affidavit in opposition to originating summons did not allude to any prospects of success was untrue and a contradiction of the factual evidence before the court. Our attention was drawn to paragraph 15.1 of the respondent's

affidavit in opposition to originating summons at page 279 to 313 of the record of appeal to which we shall revert back to in due course.

5.2 The appellant contends that the said affidavit clearly indicated the prospects of rescuing the appellant company. It alludes to the fact that there appeared reasonable prospects of rescuing the company as stated in the directors' resolution. It was contended further that a perusal of exhibit marked "MM5", the 'Report and Financial Statements', under the heading 'Future Prospects' reveals that the directors expected that the present level of activity will be improved in the foreseeable future. In addition that the said exhibit "MM5" contains a detailed statement of account which gives a glimpse of the prospects being referred to. The lower court neither considered nor addressed its mind to this evidence.

5.3 The appellant submits that despite the above evidence, the lower court made findings based on unsubstantiated assertions in the face of the facts on record that spoke for themselves and needed no further explanation. The court below should have

determined all the issues before it to avoid prejudicing any of the parties. The failure to consider the evidence prejudiced the appellant.

5.4 The cases of **Zambia Telecommunications Company Limited v Mulwanda & Ngandwe** [5] and **Wilson Masauso Zulu v Avondale Housing Project Limited** [6] on the duty of a court to completely and determine with finality all the issues in controversy before it in order to avoid a multiplicity of proceedings, were cited in support of the above arguments.

5.5 In line with the decision in **Nkhata & Others v The Attorney General** [7], we were urged to interfere with the holding of the lower court to the effect that the appellant's affidavit did not allude to prospects of success as the said finding of fact was unfounded and did not constitute the true status of affairs.

5.6 The appellant further submits that the evidence and facts in its' affidavit clearly indicated that it had adhered to the provisions of **section 21(1)(b) of the CIA.** Reliance was placed on the case of **Standard Bank of South Africa Limited** [1] cited by the learned Judge in his judgment, to show that the appellant company had reasonable prospects of being rescued. The

appellant reiterates that in the interest of justice we ought to intervene against the findings by the lower court which are unfair and contrary to the true status of affairs.

5.7 Grounds two and three were argued together. The appellant submits that though the matter in the lower court also related to the interpretation of **sections 21 and 22 of the CIA**, the judgment of the court below only interpreted section 21 and in favour of the respondent. Section 22 was not interpreted in terms of the respondent's compliance with the provisions. Neither did the court below address its mind to the arguments advanced by the appellant in arriving at its decision.

5.8 The alleged failure by the lower court being the non-consideration of the fact that the respondent did not serve all the affected parties the originating summons to set aside the BRP resolution to enable them exercise their option to participate in the proceedings. Further that the court below had addressed its mind to the consequences of the failure to comply with the provision. In particular, that **section 22(3) of the CIA** requires an affected person to serve a copy of the application on the company, official receiver and all affected

persons. The definition under **section 2(1) of the CIA** of an 'affected person' was referred to as follows;

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

5.9 The appellant submitted that the failure to comply with section 22(3) was a breach that was fatal to the respondent's application in the court below. The law does not grant the court any discretion to overlook the said failure. In the absence of proof of service the lower court ought not to have proceeded in the manner that it did.

5.10 The gist of the argument being that the lower court should have satisfied itself that the application before it had met the threshold set by the law. The case of **Khalid Mohamed v The Attorney-General** [8] was called in aid on the principle that a plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case.

5.11 The appellant contended that, in its judgment, the court below did not condemn nor chastise the respondents for not complying with the mandatory provisions of section 22(3) but

only pointed out the flaws of the appellant. We were urged to make an order that will best serve the interests of justice.

5.12 In ground four, the appellant submits that the court below, in making its decision, effectively denied the affected parties an opportunity to be heard. By not addressing its mind to the fact that the respondent's application was not served on the affected persons, the lower court overlooked the mandate to have the said parties have the opportunity to present their case and be heard on the issues that affect their interest.

5.13 The case of **C & S Investments Limited & Others v The Attorney General** [9], was called in aid for the guidance that it is prudent for a Judge seized with a matter, to research extensively on the subject matter of a case so as to be enlightened on the issues involved. Further the cases of **Ridge v Baldwin** [10] and **R v Commission for Racial Equality Ex-parte Hillingdon London BC** [11] that espouse the principle of natural justice that a party should be afforded an opportunity to be heard and the need to act fairly towards persons that will be affected by the decision, were cited. In conclusion the

appellant prayed that the appeal be allowed and the decision of the court below be reversed with costs.

6.0 **RESPONDENT'S ARGUMENTS**

6.1 The respondents filed heads of arguments dated 10th May, 2021. In response to ground one, the respondent submits that the findings of the court were on firm ground and based on the facts and evidence as presented in the court below, as such, this is a case that does not warrant the intervention of this court to interfere with the proper findings of the trial court. Our attention was drawn to the case of **Attorney General v Marcus Achiume** [12] on the principle that findings of fact made by a trial court will only be reversed on appeal if they are perverse, or made in the absence of relevant evidence or on a misapprehension of the evidence.

6.2 In respect the **Standard Bank of South Africa Limited** [1] case relied upon by the court below in arriving at its decision, it was submitted that the trial Judge properly found that there were no reasonable prospects of rehabilitating the appellant company shown to the court. Based on the aforestated case, the respondent contends that the appellant, instead of speculating

that there were prospects of rehabilitating its business, ought to have shown some convincing facts of a prima facie case of reasonable prospects. There should have been more shown than simply stating that there are prospects of rescuing the company.

6.3 With respect to paragraph 15 in the appellant's affidavit, the respondent submits that a close examination of the same reveals that it neither brings out facts that allude to any prospects of success nor does it mention what those prospects are. As regards exhibits marked "MM5" and "MM6", namely the financial statements, the same relate to the financial year of 2017 - 2018. There was no financial statement speaking to the latest or current status of the company at the time of the commencement of the BRP in 2019 which could have properly informed the directors of the financial distress the company was in and from which the company could be reasonably rescued.

6.4 The gist of the contention being that the financial statements neither alluded to nor showed any future plans regarding the prospects of successfully rescuing the business entity. The trial Judge was therefore, on firm ground to have stated that the

affidavit in opposition did not allude to prospects of success of the BRP because it did not.

6.5 In response to the issue that the lower court did not address its mind to the directors' resolutions which showed that reasonable prospects of success existed, the same was addressed and the court found that the resolution did not allude to the prospects of rehabilitating the company. The court below evaluated the said resolutions and found that it failed to meet the required standard for BRP to be invoked. To show prospects of rehabilitating the company, the company ought to have *'outlined a remedy'*.

6.6 The respondent's position is that the appellant has selectively interpreted the judgment of the lower court and did not address its mind to the main reason why the BRP failed. Reference was made to pages J15 to J16 of the judgment of the court below at pages 23 to 24 of the record of appeal, where the court below held that due to the lapse in time of 60 days, the court was precluded from accommodating the Business Rescue Administrator to enable him elaborate on the reasonable prospects of success. This was due to the wrong manner in

which the said administrator was appointed and the failure of the resolution.

6.7 The respondent in the alternative, submits that if the appellate court is of the view that the lower court erred in its findings on the prospects of rehabilitating the company, it still does not take away the fact that the appellant had prematurely appointed its Business Rescue Administrator. For this reason alone, the appellant had failed to comply with the procedure set out under **section 21 of the CIA** and the BRP ought to be set aside on that basis.

6.8 Grounds two, three and four were argued together. The respondent submits that contrary to the allegations of the appellant that there was no notification of the application on affected persons, the respondent did comply with the provisions of **section 22(3) of the CIA**. We were referred to the affidavit of service at pages 3 to 9 of the supplementary record of appeal filed on 10th May, 2021. Under paragraph 4 of the said affidavit, the deponent, Karen Tembo, gave notice of the application to set aside BRP to the employees of Chimanga Changa Limited on 6th March, 2020 and Standard Chartered Bank Zambia Plc on 10th

March, 2020. On 12th January, 2021, she served the Registrar of PACRA and the Official Receiver with the originating process. The letters of service were exhibited, collectively marked "KT/1".

6.9 Standard Chartered Bank was served in its capacity as the only known creditor to the respondents at the time. Therefore, the respondent submits that the lower court did address itself to the statutory requirement to give notice to affected persons as there was evidence before the court showing that the requirement was met. Therefore, the arguments that the learned Judge in the court below glossed over the alleged incompetence's of the respondent is untenable and based on untrue facts.

6.10 In any event, that the lower court had indicated in its judgment at page 11 of the record of appeal, that it had placed reliance on the respondent's affidavit of service dated 13th January, 2021. The said affidavit, having proved service, entails that the court had taken note that the respondent had complied with the provisions of section 22(3) and, therefore, there was no need to delve in issues that were *otiose*.

6.11 The other Limb of argument being that a perusal of the record of appeal shows that no formal application was made by the appellant to raise a preliminary issue that went to the jurisdiction of the court regarding the alleged non-compliance by the respondent to the mandatory provisions of the law, contrary to **Order 53 Rule 1 and 8 of the High Court Rules, Chapter 27 of the Laws of Zambia**.

6.12 Therefore, the appellant having only raised the issue of non-compliance with **section 22(3) of the CIA** in their submissions, the learned Judge was not bound to consider them as they are only meant to assist the court in arriving at a decision as held in the case of **Kitwe City Council v William Ng'uni** [13].

6.13 With respect to the allegation that the lower court only considered the flaws of the appellant while ignoring those of the respondent, it was contended that the flaws the appellant seeks to portray are non-existent as the respondent was fully compliant of all the procedural requirements.

6.14 The respondent further states that **section 22(3) of the CIA** neither proscribes a court from hearing an application made under **section 22(1)** nor does it state that the court should

dismiss an application when **section 22(3)** is not complied with. The failure to serve the Official Receiver and notify the affected persons neither renders the originating process irregular nor incompetent in any way, and does not result in stripping the court of its jurisdiction to determine the matter.

6.15 The affected parties have since March 2020, shown no form of interest in participating in the action. Nothing under the Act proscribes the court from proceeding when the said parties do not show interest in participating in the proceedings. The alleged failure on the part of the respondent under section 22(3) of the Act does not have any effect on the merits of the main application as the provision only sets out the procedural requirements after the commencement of an application.

6.16 As regards the participation of the affected parties in the matter, it was contended that the same is not mandatory as they are at liberty to choose whether or not to participate. We were invited to note that in its board resolution and the shareholders' resolution at pages 286 to 289 of the record of appeal, the appellant only highlighted three creditors or affected parties, being the respondent, Standard Chartered Bank Plc and

employees of the appellant. Thus, the respondent only served process and notified the affected parties directly through a letter dated 10th March, 2020. By deliberately staying away from the proceedings in the court below, the affected parties waived their right to be heard. We were urged to dismiss the appeal for lack merit as it is premised on a misapprehension of fact and law, with costs to the respondent.

7.0 **APPELLANT'S ARGUMENTS IN REPLY**

7.1 The appellant filed heads of argument in reply dated 19th May, 2021 in which it maintained that the lower court expressly stated in its judgment at page 22 of the record of appeal that the appellant's affidavit in opposition did not, in any way, allude to prospects of rescue. This implied that there was nothing at all in the said affidavit that alluded to prospects of rescuing the appellant company. Had the court found that the said affidavit did not sufficiently or correctly allude to these prospects of success, it would have rightly said so rather than to disqualify the affidavit completely.

7.2 The finding by the learned judge was made upon a misapprehension of facts and the court failed to consider the

prospects that the appellant had clearly highlighted in its affidavit. The law, does not require a party to explain the facts in detail on which it contends that there are prospects of success, but rather, to show their existence and give evidence.

7.3 As regards the non-presentation of financial statements for the year 2019, the appellant submits that this was not relevant. Of relevance is the show of reasonable prospects of rescuing the company, which the appellant did. The law does not require a party to produce the latest financial statements in order to support the said prospects. The exhibited financial statements are and were a proper representation of the liquidity of the company and the foreseeable future of rescuing it.

7.4 With respect to grounds two, three and four, the appellant submits in reply that the affidavit of service in the supplementary record of appeal does not indicate that there was an acknowledgment of receipt by the Registrar, Official Receiver and each of the employees of the appellant company.

7.5 The appellant further contends that notification of all affected parties as per **section 22(3) of the CIA**, does not speak to affected parties that are only known by the respondent, but to

each affected persons irrespective of whether the same are known or not known. Therefore, it was submitted that the proper way that the respondents would have notified each affected person would have been through a newspaper advertisement or by way of substituted service, and not via selective notification of persons only known to them.

7.6 It was further contended that service on the director of human resources as opposed to service on each individual employee of the appellant, was not proper as the said director is not mandated by any law to receive service or notification on behalf of employees of a company. In terms of **Order 65/2/3 of the RSC** and **Order 10 Rule 3 and 6 of the HCR**, it was submitted that the respondent ought to have proceeded by way of substituted service because the above rules do not provide for block notification.

8.0 **THE DECISION OF THIS COURT**

8.1 We have considered the record of appeal, the judgment of the court below and the arguments advanced by learned counsel for respective. The facts not in issue are that the appellant obtained a judgment in its favour against the appellant for

payment of the sum of ZMW 9,032,713.02 being the quantum meruit value of 3,169.78 metric tonnes of maize delivered. This was under cause 2017/HPC/0433.

8.2 Before the judgment debt could be recovered by the judgment creditor, the appellant commenced Voluntary Business Rescue Proceedings.

8.3 Thereafter the respondent (judgment creditor) issued Originating Summons dated 10th December 2019 seeking the following reliefs;

> ***(i) An order to set aside the business rescue proceedings instituted by the respondent***
>
> ***(ii) An order to set aside the appointment of the business rescue administrator***
>
> ***(iii) An order for the interpretation of section 21 and 22 of the Corporate Insolvency Act as regards breach of the said provisions***

8.4 The basis to set aside the BRP being that the provisions of **sections 21 and 22 of the CIA**, had been breached. The said provisions stipulates as follows:

> ***21. (1) Subject to subsection (2) (a), the member may by special resolutions, resolve that the company voluntarily begins business 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; and there is need to—

(i) maintain the company as a going concern;

(ii) achieve a better outcome for the company's creditors as a whole than is likely to be the case if the company were to be liquidated; or

(iii) realise the property of the company in order to make a distribution to one or more secured or preferential creditors.

(2) A resolution made in accordance with subsection (1)—

(a) shall not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) Becomes effective after it has been filed with the Registrar.

(3) Within thirty days after the board has filed the resolution, referred to in subsection (1), or such longer time as the Registrar, on application by the company, may allow, the company shall—

(a) give notice of the resolution and its effective date, to every affected person in the prescribed manner; and

(b) Appoint a business rescue administrator.

(4) The company shall, after appointing a business rescue administrator—

(a) file a notice with the Registrar of the appointment of the business rescue administrator, within seven business days after making the appointment; and

(b) Publish a copy of the notice of appointment of the business rescue administrator to each affected person,

within twenty-one business days after the notice is filed.

(5) If a company fails to comply with subsection (3) or (4)—

(a) The company's resolution to begin business rescue proceedings and place the company under supervision shall lapse after a period of sixty days from the adoption of the resolution; and

(b) The company shall not file a further resolution for a period of three months after the date on which the resolution lapsed unless the Court approves the company filing a further resolution.

(6) A company that adopts a resolution to begin business rescue proceedings shall not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed as specified in subsection (5), or until the business rescue proceedings have ended as provided in section 24 (2).

(7) Where the board has reasonable grounds to believe that the company is financially distressed but does not adopt the resolution to begin business rescue proceedings, the board shall deliver a notice to each affected person and its reasons for not adopting such a resolution.

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

(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.

(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) An affected person making an application, in terms of subsection (1), shall—

(a) Serve a copy of the application on the company and the Official Receiver; and

(b) Notify each affected person of the application in the prescribed manner.

(4) An affected person may participate in the hearing of an application made in terms of this section.

(5) 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 that subsection; or

(ii) if, having regard to all of the evidence, the Court determines that it is otherwise just and equitable to do so; and

(b) Afford the business rescue administrator sufficient time to form an opinion whether—

(i) The company appears to be financially distressed; or

(ii) There is a reasonable prospect of rescuing the company; and after receiving a report from the business rescue administrator, may set aside the company's resolution, if the Court determines that the company is not financially distressed or there is no reasonable prospect of rescuing the company.

(6) The Court may, where it makes an order under paragraph (a) or (b) of subsection (5) make any further appropriate order, including—

(a) An order placing the company under liquidation; or

(b) If the Court finds that there were no reasonable grounds for believing that the company is insolvent, make an order for costs against any director who voted in favour of the resolution to begin business rescue proceedings, unless the Court is satisfied that the director acted in good faith.

(7) If, after considering an application made in accordance with paragraph (b) of subsection (1), the Court makes an order setting aside the appointment of the business rescue administrator –

(a) The Court shall appoint another business rescue administrator who is qualified as specified in section 30, recommended by, or accepted by, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the Court; and

(b) The provisions of paragraph (b) of subsection (5), if relevant, shall apply to the business rescue administrator.

8.5 After considering the affidavit evidence and arguments before it, the lower court came to the conclusion that there was no basis upon which to find that there existed reasonable prospects of rehabilitating the appellant company. The basis for this view was that the board resolution exhibited as *"AD9"* at pages 77 to 79 of the record of appeal, neither made a pitch to the

shareholders nor alluded that there appeared reasonable prospects of rehabilitating the company.

8.6 We shall first begin by making reference to the **Corporate Insolvency Act**, in Zambia which came into effect in 2019. The said Act under which the dispute falls, defines BRP as the process of facilitating the rehabilitation of a company that is financially distressed by providing for amongst others, the temporary moratorium on the rights of claimants against the company or the implementation of a plan to rescue the company by restructuring its affairs, business, debt and other liabilities etc.

8.7 In a nutshell, one of the purposes of the BRP is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interest of all relevant stakeholders. The idea being to restore a company to profitability and avoid liquidation.

8.8 Business rescue proceedings are began by passing of special resolution resolving that the company begins BRP where the board has reasonable grounds to believe that a company is financially distressed and there appears to be a reasonable

prospect of rescuing the company and there is need to maintain it as a going concern or achieve a better outcome for the company's creditors as a whole. We refer to section 21 (1) of CI Act.

8.9 The issue for determination raised in ground one is whether the appellant had satisfied the statutory requirements for an order of BRP to have been made; particularly whether it had established that there existed reasonable prospects of rehabilitating the company. The appellant assails the holding of the court below to the effect that it had not shown or alluded to the reasonable prospects of rescuing the entity. According to the appellant it had alluded to that fact in its affidavit in support.

8.10 The lower court further found that the appellant's affidavit in opposition to originating summons did not allude to any prospects of rescuing the company.

8.11 The appellant vehemently contends that it did demonstrate in its affidavit in opposition through the **"Report and Financial Statements"** for the year ended 31st December, 2018, marked

"MM5" appearing at pages 290 to 311 of the record of appeal that there were reasonable prospects of rescuing the company.

8.12 The counter argument by the respondent is that the appellant was merely speculating as opposed to leading convincing evidence that there indeed existed reasonable prospects of rescuing or rehabilitating the company. This view was informed by the reasoning of the lower court that the financial statements simply showed the liabilities and a summary of the creditor's claims against the company.

8.13 It is trite that for the court to grant an order of BRP, it must be satisfied that the company is or is likely to become viable to pay its debts and that the order, if made, is reasonably likely to achieve an objective of administration. As regards inability to pay debts, the English decision in **Re Colt Telecom Group PLC (2002) EWHC** stated that the words *"is or likely"* to be unable to pay its debts means that it is more probable than not that the company will be unable to pay its debt.

8.14 It is not in dispute by the parties that the appellant company is unable to pay its debts. This is evidenced by the judgment debt owed to the respondent which the appellant has failed to settle.

A demand having been made, and not compiled with entails that the appellant is commercially insolvent. This is evidence of financial stress which was established and in our view is not in dispute. As regards the first precondition or element for an administration order of BRP, the appellant has met the condition that it is financially distressed.

8.15 The second pre condition/element to be satisfied under section 21 (1)(b) is that there appears to be a reasonable prospect of rescuing the company for purposes of maintaining the company as a going concern etc.

8.16 As regards the definition of reasonable prospects, the facts must indicate a reasonable possibility of rescuing the company. The key issue for determination is whether there was/is reasonable prospects on the facts that the company will be rehabilitated.

8.17 In arriving at a decision as to whether there are reasonable prospects of rescuing a company, a court is required to consider whether the applicant's affidavit in support establishes one or more of the considerations in the members' special resolution as outlined in **section 21(1) of the CIA**. These are that the company is financially distressed but that there appears to be

a reasonable prospect of rescuing the company; that there is need to maintain the company as a going concern; to achieve a better outcome for the company's creditors as a whole than is likely to be the case if the company asto be liquidated; or to realise the property of the company in order to make a distribution to one or more secured or preferential creditors.

8.18 As to the standard that a court must apply when deciding whether or not reasonable prospects of rescue exist, the learned authors of **Halsbury's Laws of England, Volume 7(3) 4th edition**, at paragraph 2084, guide as follows:

> ***"Affidavit to support petition***
> ***Where it is proposed to apply to the court by petition for an administration order to be made in relation to a company, an affidavit must be prepared and sworn, with a view to its being filed in court in support of the petition. ...***
> ***The affidavit must state:***
> ***(1) The deponent's belief that the company is, or is likely to become, unable to pay its debts and the grounds of that belief; and***
> ***(2) Which of the specified purposes is expected to be achieved by the making of an administration order.***
>
> ***In the affidavit there must be provided a statement of the company's financial position, specifying, to the best of the deponent's knowledge and belief, assets and liabilities,***

> ***<u>including contingent and prospective liabilities</u>. Details must be given of any security known or believed to be held by creditors of the company, and whether in any case, the security is such as to confer power on the holder to appoint an administrative receiver, and if, an administrative receiver has been appointed, that fact must be stated. .... <u>If there are other matters which, in the opinion of those intending to present the petition for an administration order, will assist the court in deciding whether to make such an order, those matters, so far as lying within the knowledge or belief of the deponent, must also be stated. The usual duty of full and frank disclosure is owed when an application for an administration order is made ex parte</u>. ..." (Underlining for emphasis)***

8.19 Though referring to the independent report on the company's affairs pursuant to **Rule 2.2 of the Insolvency Rules of the English Insolvency Act, 1986**, the direction by Sir Donald Nicholls in **Practice Note (Insolvency: Administration order: Independent report)** [(14)], is helpful in considering what an applicant seeking business rescue proceedings ought to state in their affidavit. His Lordship gave the following direction:

> ***"Administration orders under Part II of the Insolvency Act 1986 are intended primarily to facilitate the rescue and rehabilitation of insolvent but potentially viable businesses. It is of the greatest importance that this aim should not be frustrated by expense, and that the costs of obtaining an***

administration order should not operate as a disincentive or put the process out of the reach of smaller companies.

Rule 2.2 of the Insolvency Rules 1986, SI 1986/1925, provides that an application for an administration order may be supported by a report by an independent person to the effect that the appointment of an administrator for the company is expedient. It is the experience of the court that the contents of the r 2.2 report are sometimes unnecessarily elaborate and detailed. Because a report of this character is thought to be necessary, the preliminary investigation will often have been unduly protracted and extensive and, hence, expensive.

The extent of the necessary investigation and the amount of material to be provided to the court must be a matter for the judgment of the person who prepares the report and will vary from case to case. However, in the normal case, what the court needs is a concise assessment of the company's situation and of the prospects of an administration order achieving one or more of the statutory purposes. The latter will normally include an explanation of the availability of any finance required during the administration."

8.20 Flowing from the above, it becomes evident that the application must be based on a reasonable but objective belief supported by facts, and not mere speculation. The affidavit must show a

clear assessment of the current situation of the company and that there exist reasonable prospects that by placing the company under business rescue, the objects of the proceedings as envisaged by the law, will be achieved.

8.21 In this regard, recourse is had to the appellant's affidavit in opposition to originating summons at pages 279 to 282 of the record of appeal. Paragraph 15 deposed as follows;

"The members of the respondent company duly passed a special resolution to place the company under business rescue proceedings. The respondent's board of directors had reasonable grounds to believe the company was and still is financially distressed; that there appeared reasonable prospects of rescuing the company as outlined in the directors' resolution of 16th September, 2019. Exhibited hereto are "MM5" and "MM6" is a copy of the respondent's accounts showing liabilities and a summary of creditors' claims received from other creditors."

8.22 We are of the view that while the financial statements exhibited in the said affidavit do show that the appellant company is financially distressed, there was no concise evidence led to demonstrate that there existed reasonable prospects that by placing the company under business rescue, the objects of the proceedings as envisaged by the law, will be achieved. The

appellant has not provided enough material information to enable the court to be satisfied that if placed under BRP, the company would be maintained as a going concern or the objects of the proceedings will be achieved.

8.23 In our view, the applicant ought to have availed information to the court such as plans for revival aimed at achieving the purpose of BRP. This application for BRP lacked full disclosure. The appellant should have provided proposed plans to sustain the company. For instance a bona fide workable restructuring plan and or new capital injection from other sources.

8.24 The Board resolution stated that as result of *"deep"* financial stress due to a myriad of reasons highlighted, the company resolved to appoint a BRA and place the company under Business Rescue to enable a financial turnaround of the company in short term. The proposed plans to turn around the company were not highlighted by the appellant. Nowhere was it demonstrated that there is a reasonable prospect of rescuing the appellant company.

8.25 On the basis of the evidence adduced before the court, we cannot fault the court below for holding that there was no

foundation laid by the board, that there were reasonable prospects of rescuing the appellant company and that the shareholders had no basis to take out voluntary BRP.

8.26 It is not in issue that the BRP was commenced after judgment was entered against the appellant. In our view, the application for BRP in its self appears to be an attempt to avoid and postpone payment of the respondent's debts. Herein lies the danger of abuse that rescue proceedings may lend themselves to such as being abused by companies seeking to frustrate creditor's rights by manipulation the BRP.

8.27 As courts we must balance the two competing interests of the company in distress and the other stakeholders and to combat abuse and manipulation of BRP. Hence the protection afforded to creditors under the CIA to challenge a resolution adopted by the company's board of directors by applying to apply to court to have the resolution set aside on the ground that there is no reasonable basis to believe that the company is financially distressed and or that there is no reasonable prospect that the company will be rescued or even on the basis that the company

has failed to comply with the procedural requirements set out in section 21 of CIA.

8.28 From the grounds and evidence provided for the BRP, we deduce and hold that there is no reasonable prospect of rescuing the company shown for the purpose of achieving one of the outcomes earlier stated. There is no attempt to genuinely to achieve the goals of business rescue. The court below was on firm ground in setting aside the business rescue resolution as it was ill founded.

8.29 The fact that a company is financially distressed and owes several creditors on its own, is not sufficient reason to place a company under business rescue. It must further be shown that apart from this financial distress, the company can avoid liquidation if certain measures are put in place. Those measures need not be in detail, but must be sufficiently concise to enable the court make an informed decision.

8.30 Therefore, we cannot fault the court below for holding that the appellant's affidavit in opposition to originating summons did not in any way allude to any such prospects of success. For this reason, ground one lacks merit and is dismissed.

8.31 We propose to address grounds two, three and four together as they all relate to the issue of whether or not the respondent complied with the provisions of **section 22(3) of the CIA** which provides as follows:

> ***(3) An affected person making an application, in terms of subsection (1), shall—***
>
> ***(a) Serve a copy of the application on the company and the Official Receiver; and***
>
> ***(b) Notify each affected person of the application in the prescribed manner.***

8.32 The appellant contends that the court below in deciding the issue of compliance with sections 21 and 22 of the CIA 2017 glossed over the incompetencies in the respondent's claim. The court failed to determine the issue of whether it had jurisdiction to hear the matter on the basis of lack of compliance with the provision of section 22(3).

8.33 In addition, that the respondent did not comply with the provision of section 22 (3) of CIA as the affected parties were not served with a notice of the hearing. It was contended that by not effecting service of the application on the affected parties, the said parties were denied an opportunity to take part in the said

proceedings and as such, the application was rendered incompetent. The appellant took the view that the affected parties ought to have been served the notice of the application by way of advertisement. The affected parties being the official receiver and all affected parties of the BRP.

8.34 **Section 22(1) of the Corporate Insolvency Act, 2017** provides that an affected person may apply to court for an order to set aside the resolution on the ground specified under 22(1)(a)(b) and (c). Under subsection 3 (a) & (b) an affected person making the application shall serve a copy of the application (to set aside the resolution) on the company and officer receiver and notify each affected person of the application in the prescribed manner.

8.35 We have perused through the supplementary record of appeal filed on 10th May, 2021 by the respondent. The said record contains an affidavit dated 13th January, 2021 deposed by Karen Tembo, of Messrs. Milner and Paul Legal Practitioners, the law firm seized with conduct of the matter. The deponent states that on 6th March, 2020 she served notice on the employees of the appellant company through the Director of

Human Resources. Proof of service is a Zambia Postal Services Corporation receipt at page 9 of the supplementary record of appeal.

8.36 A creditor of the company, Standard Chartered Bank Zambia Plc and the Registrar of PACRA were also served via letters dated 10th March, 2020as per exhibited letters of notice marked "KT/1".

8.37 The appellant argued that, with respect to the employees of the appellant company, proper service should have been on each and every employee, and as such, a newspaper advertisement would have been proper.

8.38 We note that **section 22(3)(b) of the CIA** provides that service on each affected person shall be ***'in the prescribed manner'***. However, a reading of the Act in issue does not state what the prescribed manner is for service of the application to set aside business rescue proceedings on an affected party.

8.39 An affected person under the CIA Act is defined to include a regulator, shareholder, director member, creditor or an employee, registered trade union and Registrar. The appellant

contends that this failure to comply with service on all affected persons entails that court had no jurisdiction to proceed.

8.40 As regards service on the Registrar of Pacra and Standard Chartered Bank, there is no issue. The issue on service on the employees being that there was no proper notification. Further that not all affected person were notified.

8.41 The issue then is what is the effect of non-service by on all affected persons by the respondent of the application to set aside the business rescue resolution to commence BRP? The appellant contends that the affected persons were not afforded the opportunity to be heard on the application to set aside the resolution to commence BRP.

8.42 We are of the view that it is for the said affected persons to take issue and make the requisite application against the respondent and not for the appellant to raise the issue on behalf of other parties deemed affected parties.

8.43 It is for the affected parties to allege that their right to be heard was infringed or breached on account of non-compliance with section 22(3)(b) of CIA and argue the alleged lack of jurisdiction

by the court to proceed against a party who was not served or notified of application.

8.44 It is trite that the resolution sought to be set aside was made by the board of the appellant company. The appellant was served with the application to set aside the resolution to put the company under business rescue and objected to the same, a right it had. What we cannot fathom is their objection on behalf of other affected parties who are alleged not to have been notified in the prescribed manner.

8.45 We do not have issue with the provisions of Order X Rule 3 of the High Court Rules on personal service and the position of the law that where it is made to appear that prompt personal service cannot be affected, the court may make such order for substituted or other service. That is the procedure as to service of writs, summons etc.

8.46 The point is that where service is alleged not to have been effected, as in *casu,* on affected persons, it is for the alleged affected persons to raise the issue of lack of jurisdiction for court or to apply to set aside an order in or ruling made on the basis of not having been served.

8.47 Therefore the argument that the court below failed to pronounce itself on the provisions of **section 22 (3) of the CIA** and that the court below lacked jurisdiction to hear the matter on basis of lack of compliance is untenable. The court below had jurisdiction to hear the application by the respondent to set aside the resolution in issue.

8.48 Having earlier held that on the evidence placed before the lower court, we are not satisfied that the resolution to commence BRP by the appellant had satisfied or met the threshold under order 21(1)(b) ; namely that there does not appear to be reasonable prospects of rescuing the company to achieve the outcomes under subsection (i) to (iii); we accordingly dismiss the appeal and uphold the judgment of the court below. Costs follow the event.

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M. M. Kondolo

COURT OF APPEAL JUDGE

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F. M Chishimba

COURT OF APPEAL JUDGE

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P. C. M. Ngulube

COURT OF APPEAL JUDGE