

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

14 OCT 2020

2020/HPC/0555

IN THE MATTER OF: BROOKS CHERITH ESTATES AND DEVELOPERS
LIMITED
IN THE MATTER OF: THE CORPORATE INSOLVENCY ACT NO. 9 OF 2017
IN THE MATTER OF: ORDER 36, RULE 10 OF THE HIGH COURT RULES,
CHAPTER 27 OF THE LAWS OF ZAMBIA

BETWEEN:

NATHAN SINKALA AND 120 OTHERS

PETITIONERS

AND

BROOK CHERITH ESTATES AGENTS AND
DEVELOPERS LIMITED

RESPONDENT

CHARLES CHANDA

APPLICANT

CORAM: Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka on the
14th day of October, 2020

For the Petitioners: Mr. K. Mambwe and Ms. C. Chibabwe of Ferd Jere and
Company

For the Respondent: Mr. M. Phiri of Mwack Associates

RULING

Cases referred to:

- 1) *Chikuta v. Chipata Rural Council* (1974) Z.R. 241 (S.C.).

Legislation referred to:

- 1) Section 21 (2) (a) of the Corporate Insolvency Act No. 9 of 2017
- 2) Sections 55, 56, 57 and 60 of the Corporate Insolvency Act.
- 3) The Companies (Winding-Up Rules) 2004, S.I. No. 86 of 2004.
- 4) Section 23 (1) of the Corporate Insolvency Act.

- 5) *Section 2 of the Corporate Insolvency Act.*
- 6) *Order 2, rule 2 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).*

Other authority cited:

- 1) *Patrick Matibini, Civil Procedure – Commentary and Cases, Volume 1, (LexisNexis, 2017) at page 63.*

This is an application by the Petitioners for an order to set aside business rescue application and *ex parte* Order dated 20th August, 2020 for irregularity, pursuant to Section 21 (2) (a) of the Corporate Insolvency Act No. 9 of 2017. The Summons for an Order to Set Aside Business Rescue Application and *Ex Parte* Order dated 20th August, 2020, is accompanied by a combined Affidavit in Support of *ex parte* Summons to Stay Order dated 20th August, 2020 and Business Rescue Proceedings and Summons for an Order to Set Aside Business Rescue Proceedings (hereinafter referred to as “the Affidavit in Support”) and List of Authorities and Skeleton Arguments in Support, all filed on 2nd September, 2020.

The Affidavit in Support was sworn by one Nathan Sinkala, the 1st Petitioner herein. It is his testimony that he is the 1st Petitioner in this matter and is duly authorised by the other 120 petitioners to swear to the Affidavit from facts known and given to him. He avers that the record will show that on 9th July, 2020, the Petitioners commenced a winding up petition in the Commercial Registry of the High Court of Judicature for Zambia under cause number 2020/HPC/0555 and the Court on 20th July, 2020 duly appointed Mr. Billington Mosha as the provisional liquidator of the Respondent.

The deponent asserted further, that on 17th August, 2020, Charles Chanda, a non-party to the action purportedly made an application in the liquidation proceedings under the same cause 2020/HPC/0555 to commence Business Rescue Proceedings (BRP) by way of Originating Notice of Motion supported by an Affidavit. Further, that in the same application Charles Chanda ("the Applicant") altered the parties by removing the Petitioners and replacing his name as the Applicant while the Respondent was maintained. Consequently, the Petitioners have effectively been misjoined from the proceedings at the instance of the Applicant without being heard. It was further averred that the record will show that in the new action of BRP, the Applicant was granted an *ex parte* Order suspending winding up proceedings and since there was no interim Business Rescue Manager appointed by the Court, the Applicant claims that he has been duly allowed to prevail over the affairs of the Respondent. The deponent avers that he has been advised by his lawyers and verily believes that the commencement of BRP in the liquidation matter is irregular and the alteration of parties and obtaining of an *ex parte* Order was erroneously done.

The application is opposed and to this end, the Respondent filed an Affidavit in Opposition to Application to Set Aside Order dated 20th August, 2020 and Business Rescue Proceedings (hereinafter referred to as "the Affidavit in Opposition") on 28th September, 2020 deposed to by one Charles Chanda, the Applicant, who asserts that he is the Applicant herein and shareholder/director in the Respondent Company, hence competent to swear the Affidavit from facts which

came to his knowledge in the said capacities. It is his testimony that on 9th September, 2020, he was served with a combined Affidavit in Support of *ex parte* Summons to Stay Order dated 20th August, 2020 and Summons for an Order to Set Aside Business Rescue Proceedings deposed to by one Nathan Sinkala and his response to the same is that he made the application for business rescue in his capacity as shareholder/director of the Respondent Company. He denied altering the parties to this action as alleged in the Affidavit in Support and averred that he had been advised by his lawyers and verily believed that the law gives him the power and authority to make an application for business rescue in his capacity as shareholder/director of the Defendant Company.

The Applicant further averred that it is not true that the Petitioners have been misjoined from these proceedings as alleged by the Petitioners. He denied the allegation in paragraph 11 of the Affidavit in Support that he is claiming to be duly allowed to prevail over the affairs of the Respondent and asserted that he had been advised by his lawyers and truly believed that under the law he can still operate the affairs of the Respondent Company until such a time when a Business Rescue Manager has been appointed by this Court.

He further averred that it is not true that the commencement of BRP is irregular as alleged in paragraph 12 of the Affidavit in Support because he verily believed that he made the application in his capacity as director/shareholder of the Respondent Company. He further reiterated his earlier averment that it was not true that he had altered the parties to the proceedings.

The application came up for hearing on 9th October, 2020 and the parties informed the Court that Counsel for both parties had agreed that since both parties had filed their Affidavits in Support of and in Opposition, respectively, to the application before Court, and the Petitioners had filed Skeleton Arguments in Support, they were seeking the Court's indulgence to be allowed to rely on the said documents and prayed that the Court would render its ruling on the application based on the same documents. The Court was amenable to the request by Counsel to dispense with oral arguments and reserved its ruling.

The Petitioners filed their Skeleton Arguments on 2nd September, 2020 while the Applicant did not file any. It was submitted on behalf of the Petitioners that the record will show that the proceedings in this case were brought pursuant to Sections 55, 56, 57 and 60 of the Corporate Insolvency Act No. 9 of 2017 which reads in section 55 as follows:

"The Court has jurisdiction to wind up in accordance with this Act, a body corporate incorporated in –

(a) Zambia; and

(b) A foreign country and..."

It was contended that from the foregoing provision of the Corporate Insolvency Act, it is apparent that this Court has jurisdiction to hear a winding up petition in relation to a company incorporated in Zambia. Consequently, the Companies (Winding-Up Rules) 2004 are instructive if the shareholders or any interested party intends to be heard in winding up proceedings once they have commenced.

It was submitted that Rule 10 (1) of the Winding up Rules provides as follows:

"A person who intends to appear on the hearing of a petition shall file into court a notice of that person's intention in Form 3 set out in the Schedule."

Further, that Section 60 of the Corporate Insolvency Act provides that:

"The Court may, on hearing a winding-up petition –

(a) grant the petition;

(b) dismiss it with or without costs;

(c) adjourn the hearing conditionally or unconditionally; or

(d) make any interim order or other order as it considers in the circumstances."

It was submitted that the Applicant's BRP are irregular for lack of compliance by the Applicant with Rule 10 (1) of the Winding-Up Rules and thus, must be dismissed.

It was submitted in addition, that the Applicant opted to commence BRP in accordance with Section 23 (1) of the Corporate Insolvency Act No. 9 of 2017 which states:

"An affected person may apply to the Court for an order to place the company under supervision and begin business rescue proceedings."

It was argued that the record will show that the Applicant filed originating process in winding up proceedings, by way of originating notice of motion supported by an affidavit, in a case where the Petitioners had already filed a petition as required by law. It was asserted that in the case of *Chikuta v. Chipata Rural Council*¹, the Supreme Court held:

"...The Zambian rules are much more rigid. Under Order 6, rule 1, every action in the court must be commenced by writ, except as otherwise provided by any written law or the High Court Rules. Order 6, rule 2 states that any matter which under any written law or the Rules may be disposed of in chambers shall be commenced by an originating summons. Rule 3 provides for matters which may be commenced by an originating notice of motion. It is clear, therefore, that there is no case where there is a choice between commencing an action by a writ of summons or by originating summons. The procedure by way of an originating summons only applies to those matters referred to in Order 6, rule 2, and to those matters which may be disposed of in chambers."

It was contended that it is clear that section 23 (1) of the Corporate Insolvency Act does not prescribe for an interlocutory application but rather a mode of commencement and thus, it was irregular to commence an action in a liquidation matter.

It was further argued on behalf of the Petitioners, that the Applicant, without being joined to the proceedings, unilaterally designated himself the applicant in the matter between Nathan Sinkala and Others v. The Respondent – 2020/HPC/0555 in which he was not a party to the proceedings. It was contended that that was irregular because a party seeking to be heard must seek leave of the court before joining. Further, that Charles Chanda purportedly misjoined the petitioners in the same matter as it now appears as Charles Chanda v. The Respondent – 2020/HPC/0555. That, erstwhile High Court Judge Matibini in his book entitled Zambian Civil Procedure – Commentary and Cases, Volume 1, at page 63, states that parties may be added, substituted, or removed in existing proceedings, either on the court's initiative or on the application of an existing party or a party who wishes to become a party. It was argued

that since alteration of parties requires leave of court, the alteration done by Charles Chanda to the parties herein without leave of Court was irregular and Charles Chanda has no *locus standi* in the matter.

Submitting further, it was stated that section 23 of the Corporate Insolvency Act gives the Court discretion to grant an application for BRP by stating in subsection (4) thereof as follows:

"The Court may after considering an application made in accordance with subsection (1) –

(a) make an order placing the company under supervision and begin business rescue proceedings, if the Court determines that –

- (i) the company is financially distressed;*
- (ii) the Company has failed to pay any amount in terms of an obligation under a contract with respect to employment related matters; or*
- (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect of rescuing the company." (Emphasis by the Petitioners)*

The Petitioners contended that a cursory perusal of the Affidavit in Support of the Originating Notice of Motion shows that the Applicant has not demonstrated that there are high prospects of rescuing the company. That, under paragraph 10 of the Affidavit alluded to above, Charles Chanda has exhibited as "CC1", a copy of the rescue plan which, according to the Petitioners, fails in all respects as it is a document prepared without any evidence to back it up. It was submitted, in conclusion, that in view of the aforesaid, this is an appropriate case in which to grant the relief sought, with costs.

I have considered the Petitioners' application for an order to set aside business rescue application and Order of 20th August, 2020 for irregularity, supporting Affidavit and Skeleton Arguments. I have also

considered the Respondent's Affidavit in Opposition. However, before I proceed with determination of the application, I would like to point out the fact that the provision of the law cited by the Petitioners, pursuant to which the application before Court has been brought, is inappropriate. According to the summons, the application before Court has been brought pursuant to section 21 (2) (a) of the Corporate Insolvency Act. Section 21 (1) and (2) of the Corporate Insolvency Act provides as follows:

"21. (1) Subject to subsection (2) (a), the member may by special resolution, 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 or 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..."

(Highlighting by the Court for emphasis only)

In my considered view, while a winding-up petition has been filed in this matter, the Petitioners' application to set aside the BRP and Order of 20th August, 2020, is not based on an allegation that a special resolution was passed for the Respondent to voluntarily begin BRP and

the said resolution was adopted after the initiation of the winding-up proceedings by the Petitioners. The application before this court is to set aside the BRP and Order suspending winding-up proceedings for irregularity. Therefore, the correct provision for such an application is Order 2, rule 2 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book) which states as follows:

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

(2) An application under this rule may be made by summons or notice of motion." (Emphasis by the Court)

I am of the further view that since the Petitioners have alleged that the Applicant, a non-party, did not follow the requirements of Rule 10 (1) of the Companies (Winding-Up) Rules, 2004, the said Rule should have been the additional law pursuant to which the Petitioners should have brought their application before Court. The above observations notwithstanding, I will exercise my discretion and proceed to determine the application despite the irregularity I have highlighted above, in the interest of justice.

It is not in dispute that the Petitioners herein commenced a winding-up petition against the Respondent in the High Court Commercial Registry under cause number 2020/HPC/0555 on 9th July, 2020 and on 20th July, 2020 the Court appointed Mr. Billington Mosha as the provisional liquidator of the Respondent. It is also on record that on 17th August, 2020, the Applicant filed an originating notice of motion supported by Affidavit, in the Commercial Registry

under the same cause number, to place the Respondent under supervision and commence BRP. This Court, pursuant to section 23 (7) of the Corporate Insolvency Act, suspended the winding-up proceedings by Order dated 20th August, 2020. It is this same Order as well as the BRP that the Petitioners seek to be set aside for irregularity.

The grounds upon which the Petitioners have applied to this Court to set aside the Order and BRP have been well articulated by the Petitioners in their Affidavit in Support and I will not repeat them here, save to say that the Petitioners have alleged that the Applicant is a non-party to the proceedings who has applied to this Court to place the Respondent under supervision and commence BRP by filing an originating notice of motion within the liquidation proceedings already before Court, without following Rule 10 (1) of the Winding up Rules, 2004 which requires a person who intends to appear at a winding-up petition to file into court a notice of that person's intention in Form 3 set out in the Schedule. Further that the Applicant has effectively misjoined the Petitioners herein by altering the parties by removing the Petitioners and replacing his name as the Applicant while the Respondent was maintained.

The Applicant on the other hand has contended that he made the application for business rescue in his capacity as shareholder/director of the Respondent Company. He has denied altering the parties to this action and has stated that the law gives him the power and authority to make an application for business rescue in his capacity as shareholder/director of the Defendant Company. He has further

denied having misjoined the Petitioners from these proceedings as alleged by the Petitioners. He has furthermore, stated that it is not true that the commencement of business rescue proceedings is irregular because he made the application in his capacity as director/shareholder of the Respondent Company.

After considering the documents filed by the parties hereto, I am of the view that the issues for consideration by this Court, are firstly, whether or not the Applicant herein has the *locus standi* in the winding-up proceedings before this Court to apply to place the Respondent under supervision and commence BRP and secondly, whether or not the commencement of BRP by the Applicant, by way of originating notice of motion, under the same cause as the winding-up proceedings, is legally valid.

It is a fact that the parties to the winding-up petition before this Court are the Petitioners and the Respondent and therefore, the Applicant, Charles Chanda, is a non-party to these proceedings. This is notwithstanding the fact that he is a shareholder /director in the Respondent Company because his position as shareholder/director in the Respondent Company *per se*, does not give him *locus standi* in these proceedings. While it is true that the Applicant as an “affected person” as defined in section 2 of the Corporate Insolvency Act, (which includes a shareholder and a director), has the right under section 23 (1) to apply to the Court for an order to place the company under supervision and begin BRP, he can only exercise that right after filing a notice of intention to appear on the hearing of a petition as required by Rule 10 (1) of the Companies (Winding-Up) Rules, 2004. By filing that

notice, the interested person is in effect seeking the leave of court to appear and be heard. The Applicant herein did not seek leave of Court to appear on the hearing of the winding-up petition herein. Therefore, he has no *locus standi* in the winding-up proceedings brought by the Petitioners.

The second issue for consideration as indicated above, is whether or not the commencement of BRP by the Applicant by way of originating notice of motion, under the same cause as the winding-up proceedings, is legally valid. It was argued by the Petitioners that the commencement of the BRP under the liquidation proceedings was irregular and the alteration of the parties to the winding-up proceedings was erroneously done. I agree with the Petitioners. The action by the Applicant in commencing BRP by originating notice of motion under the same cause as the winding-up petition in effect amounted to instituting two modes of commencement of proceedings in the same cause and hence, an irregularity.


Rather than commence BRP by way of originating notice of motion under the same cause as the winding-up petition, which amounted to an irregularity, the Applicant as an affected person, should have filed a notice of intention to appear on the hearing of the petition as required by Rule 10 (1) of the Companies (Winding-Up) Rules, 2004. The Applicant would then have had the necessary *locus standi* in the petition by virtue of section 23 (1) of the Corporate Insolvency Act to apply to the Court by summons to place the Respondent under supervision and begin BRP.

I will not deal with the Petitioners' arguments relating to the Applicant's alleged failure to demonstrate high prospects of rescuing the Respondent and defects in the rescue plan, because these are not in issue in this application.

For the reasons given above, the application has succeeded. The Applicant's application to place the Respondent under supervision and commencement of business rescue proceedings is set aside for irregularity. Further, the *ex parte* Order suspending winding-up proceedings under this cause dated 20th August, 2020 is also set aside. Costs of and incidental to this application are awarded to the Petitioners, to be agreed or taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 14th day of October, 2020.


Dr. W. S. Mwenda
JUDGE