IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO/76/2020
HOLDEN AT KABWE

(Civil jurisdiction)

B E T W E E N:

CHIMANGA CHANGA LIMITED **APPELLANT**

AND

EXPORT TRADING LIMITED **RESPONDENTS**

Coram: ***Chisanga JP, Mulongoti and Siavwapa JJA***
On 13th October and 23rd October, 2020

For the Appellant: *Mr. A. Roberts of Alfred Roberts & Co.*

For the Respondent: *Miss K. Tembo of Paul and Milner Associates*

J U D G M E N T

Siavwapa JA; delivered the judgment of the Court

Cases referred to:

1. *Thomas Cook vs Mortgage Debenture Limited [2016] 3 ALL ER 975*
2. *New Plast Industries v Commissioner of Lands and Another (2001) ZR. 51.*
3. *Christopher James Thorne v Christopher Mulenga and Others (2010) 1 ZR 221*
4. *Robert Mbonani Simeza (sued as receiver/Manager of Ital Terrazzo Ltd, Finance Bank (Z) Ltd v Ital Terrazzo Ltd Appeal No.144/2009.*
5. *Anderson Kambela Mazoka and Others vs Levy Patrick Mwanawasa and Others (2015) ZR 158.*
6. *Chishala and others v Laston Geoffrey Mwale SJ No 40 of 2018.*
7. *African Banking Corporation of Botswana Ltd vs Kariba Furniture Manufacturers (PTY) Limited and others (2015) 3 ALL SA 10 and*

8. *Newport Finance Company (PTY) Ltd and another v Nedbank Ltd (2015) 2 ALL SA 1.*

1. INTRODUCTION

This appeal arises from the Ruling handed down by the High Court of Zambia Commercial Division presided over by the Honourable Mr. Justice K. Chenda on 3rd March, 2020. By the said Ruling, Mr. Justice Chenda dismissed the preliminary objection raised by the Appellant on account of his held view that the Respondent did not need to seek permission from the Business Rescue Administrator or the Court to challenge the legality of the Institution of Business Rescue proceedings.

2. BACKGROUND

The Respondent had supplied maize grain to the Appellant which carries on the business of grain milling. The total value of the maize supplied is placed at K9, 032,713.05. However, the Appellant refused to take delivery of part of the contractual quantity of maize thereby occasioning loss and damages to the Respondent.

Aggrieved by the Appellant's conduct, the Respondent commenced an action in the Commercial Division of the High Court seeking Orders for specific performance, payment of the sum of K9,032,913.05 on quantum meruit basis as the value of the 3,196,379 metric tonnes of maize delivered to and received by the Appellant, Damages for breach of contract,

payment of K6,347.95 being the value of the rejected 2,227,167 tones of maize, an Order of interim attachment of property pending determination of the matter, interest and of any other relief.

3. JUDGMENT OF THE HIGH COURT

The Court below considered the arguments for and against the claim including the Appellant's counterclaim and formulated four (4) statements for the Court's determination namely:

1. Whether the Plaintiffs received a valid notice of termination of the contract from the Defendant.
2. Whether the Plaintiff delivered the maize in accordance with the terms of the contract and the Defendant accepted the said maize voluntarily.
3. Whether the Plaintiff is entitled to the reliefs sought and
4. Whether Defendant is entitled to the counterclaim.

After analyzing the relevant clauses of the contract between the parties; the learned Judge settled the first issue in the negative having found that the contract subsisted. She resolved the second issue in the affirmative. With regard to the third issue, the learned Judge resolved it by holding that since the plaintiff had asked for damages, the discretionary remedy of specific performance was not available.

The learned Judge also found the Respondent liable for payment of the claimed K9,032,713.05 on quantum meruit as

value of the delivered maize as well as damages for breach of contract while the counterclaim was dismissed accordingly.

4. THE APPEAL

Having failed to defend the Respondent's suite and having lost on its counterclaim, the Appellant lodged a Notice and Memorandum of Appeal against the Judgment on 28th August, 2019.

Subsequent to that, the Appellant passed two special resolutions in September, 2019. The first Resolution was to place the Appellant under Business Rescue pursuant to Section 21(1) of the Corporate Insolvency Act No.9 of 2017.
By its second special Resolution, the Appellant appointed Mr. Mando Mwitumwa as Business Rescue Administrator pursuant to Section 21(3) (b) of the Corporate Insolvency Act No.9 of 2017.

5. THE RESPONDENT'S REACTION

Upon becoming aware of the Resolutions passed by the Appellant through a Newspaper advertisement, the Respondent, through its Advocates, wrote to the Business Rescue Administrator on 19th November, 2019 requesting him to furnish them with proof that the Appellant was in Financial Distress and his registration with Patents and Companies Registration Agency (PACRA) as an Insolvency Practitioner.

6. THE SUMMONS

On 10th December, 2019, the Respondent filed into Court an Originating Summons supported by an affidavit by which it sought the following reliefs:

1. An order to set aside Business Rescue Proceedings instituted by the Respondent.
2. An Order to set aside the appointment of the Business Rescue Administrator.
3. An Order for the interpretation of sections 21 and 22 of the Corporate Insolvency Act as regards breach of the said provisions.
4. Further or other reliefs as the Court may deem fit.
5. Interest and
6. Costs of and incidental to the action.

The summons was taken out pursuant to Sections 21 and 22 of the Corporate Insolvency Act No.9 of 2017 and Order XXX rule 11 of the High Court Rules.

7. APPELLANT'S RESPONSE

In response to the Originating Summons, the Appellant filed a Notice of Motion to dispose of the case on a preliminary issue on a point of law pursuant to Orders 14A and 33 rule 7 of the Rules of the Supreme Court 1999 edition.

In that motion the Appellant advanced four issues for the Court's determination namely:

1. That the Court has no jurisdiction to hear the Originating Summons and ought to dismiss the action as procedurally incorrect in view of the default by the Applicant in not obtaining either the written consent of the Respondent's Business Rescue Administrator or the prior leave of Court to commence legal proceedings against the Respondent as per Section 25(1) (a) and (b) of the Corporate Insolvency Act No.9 of 2017.
2. That the reliefs sought by the Applicant in paragraphs 1 and 2 of the Originating Summons do not fall within the purview of Order XXX rule 11 of the High Court Rules and as such the Applicant ought to have commenced the action by way of Writ of Summons and not Originating Summons.
3. That the rightful party to be cited as Respondent in the Originating Summons should have been "Chimanga Changa Limited (under Business Rescue Proceedings)" and not in the name of Chimanga Changa Limited.
4. That the Originating Summons be dismissed with costs to the Respondent.

8. THE DECISION OF THE HIGH COURT

On the 3rd March, 2020, the Honourable Mr. Justice K. Chenda delivered his ruling on the motion and dismissed it on all the issues advanced.

The learned Judge dismissed the first issue on the ground that there was no interplay between sections 22(1) and 25(1) of the Corporate Insolvency Act by reason of which the moratorium in section 25(1) does not apply to section 22(1).

In dismissing the second issue, the learned Judge reasoned that since the Corporate Insolvency Act and the High Court Act do not prescribe a mode of commencing an action under section 22(1) of the Corporate Insolvency Act, Order 5 rule 3 of the Rules of the Supreme Court 1999 edition was applicable. The said rule provides as follows:

> *"Proceedings by which an application is to be made to the High Court or a Judge thereof under any Act must be began by Originating Summons except whereby these rules or by or under any Act the application in question is expressly required or authorized to be made by some other means."*

On the third issue, the learned Judge considered the role of the Business Rescue Administrator and that of a Receiver and found the two to be different. Further he found that whereas section 15 of the Act specifically shifts *locus standi* and the power of sale to the Receiver, there is no similar provision for a Business Rescue Administrator and dismissed this issue.

9. THIS APPEAL

It is the dismissal of the preliminary issues that has birthed the appeal herein which was field into court on 16th March 2020. The Appeal is anchored on four grounds as follows:

1. The lower Court erred in law and fact by holding that the Respondent did not require the consent of the Appellant's Business Rescue Administrator or the prior leave of Court as required by section 25(1) (a) and (b) of the Corporate Insolvency Act No.9 of 2017 for the Respondent to apply to Court for the setting aside the Business Rescue Proceedings as well as to set aside the appointment of the Appellant's Business Rescue Administrator.
2. The lower Court erred in law and fact by holding that an application under section 22(1) of the Corporate Insolvency Act No.9 of 2017 is not a "legal proceeding" against a company in business rescue but an action to challenge the validity of a resolution to commence business rescue proceedings.
3. The lower Court erred in law and fact by holding that the action was properly commenced by way of Originating Summons under Order 5 rule 3 of the Rules of the Supreme Court of England when in fact the matter should have been commenced by Writ of Summons.

4. The lower Court erred in law and fact by holding that the rightful party to be sued as the Respondent is Chimanga Changa Limited and not Chimanga Changa Limited "under Business Rescue Proceedings."

10. APPELLANT'S ARGUMENTS

Grounds 1 and 2 were argued together and the import of the arguments is that the only exclusion of the application of the moratorium in section 25(1) of the Corporate Insolvency Act No.9 of 2017 is where the company under Business Rescue is the Plaintiff and not the Defendant. This position was premised on the decision of the Court of Appeal of England and Wales in the case of ***Thomas Cook vs Mortgage Debenture Limited***[1] which held that the moratorium did not apply to defensive actions or steps.

It is accordingly argued that in this case, the Respondent's action was not defensive but offensive and therefore captured by the moratorium under section 25 (1) of the Act.

The second limb of the argument is that by holding that there was no interplay between section 22(1) and section 25(1) of the Act, the learned Judge read something into the Statute.

On ground three, the argument is that the learned Judge failed to address all the issues and to apply several precedents

and rules that provide that proceedings in the High Court should be commenced by Writ of Summons with special reference to Order 6 rule 1 of the High Court Rules as well as the case of ***New Plast Industries v Commissioner of Lands and Another.***[2]

It was submitted that the Court below had no jurisdiction to entertain a matter brought by Originating Summons when it should have been brought by Writ of Summons as per the case of ***Christopher James Thorne v Christopher Mulenga and Others***[3]

In ground four, the Appellant heavily relies on the practice and procedure pertaining to receiverships on the roles of a Receiver in a company and the conferring of *locus standi* in law suits by or against the company. Further reliance was placed on the case of ***Robert Mbonani Simeza (sued as receiver/Manager of Ital Terrazzo Ltd, Finance Bank (Z) Ltd v Ital Terrazzo Ltd.***[4]

11. RESPONDENT'S ARGUMENTS

On grounds 1 and 2 it is argued and submitted that the learned Judge was on firm ground to use the literal rule when interpreting Sections 22 and 25 of Corporate Insolvency Act as the language used is clear with no indication of an interplay between the two sections.

We were referred to the case of ***Anderson Kambela Mazoka and Others vs Levy Patrick Mwanawasa and Others***[5] to wit:

> *"it is trite law that the primary role of interpretation is that words should be given their ordinary grammatical and natural meanings"*

It was further argued that the Respondent did not commence legal proceedings as envisaged under section 25 (1) of the Act when it challenged the resolution to place the Appellant under Business Rescue Administration.

Further that Section 22(1) does not provide for seeking permission from either the Business Rescue Administrator or the Court before commencing an action.

On ground 3, the Respondent has argued that the learned Judge was on firm ground when he held that the action was properly commenced by Originating Summons pursuant to Order XXX rule 11 of the High Court Rules and Order 5 rule 3 of the Rules of the Supreme Court 1999 edition.

It is argued that with both Section 22(1) of the Corporate Insolvency Act No.9 of 2017 and Order XXX rule 11 of the High Court Rules not explicit on the mode of commencement, Order 5 rule 3 of the Rules of the Supreme Court 1999 edition becomes applicable.

It was also pointed out that since Section 22(1) of the Corporate Insolvency Act uses the word "apply" it envisages that the mode of commencement is by an application and as such the action was properly commenced.

On ground 4, the Respondent has argued that there is no express provision in the Corporate Insolvency Act that shifts the standing of a company in Business Rescue to the Business Rescue Administrator. The arguments in support are that the Business Rescue Administrator stands on the same footing as a Director without liability and Section 32 (3) was called in aid. Further, in jurisdictions such as South Africa and the United Kingdom, Companies in Business Rescue are cited in their own names.

12. OUR DECISION

This appeal, as is the matter in the Court below, hinges on the interpretation of Sections 21, 22 and 25 of the Corporate Insolvency Act No.9 of 2017.

The Appellant, as a judgment debtor to the Respondent, opted to place itself under Business Rescue so that it could enjoy the temporary protection of the general moratorium against any demands from the Respondent and other Creditors by way of legal proceedings. It is therefore, important to give a synopsis of Business Rescue Administration.

The starting point is that there must be evidence that the Company is in financial distress which, if not resolved, would result in defaulting on its debts and ultimately lead to insolvency.

It must however, also be shown that the Company can be rescued from its financial malaise if specific measures are put in place and become profitable again. Business Rescue also has the objective to offer the best benefits to all its creditors regardless of status.

The above stated objectives are supported by a general moratorium which temporarily gives breathing space to the Company from any legal proceeding by a claimant owed by the Company.

13.0 THE LAW

Section 21, which is the first section in part III dealing with Business Rescue Proceedings provides the procedure by which a Company may be placed under Business Rescue Proceedings.

It is noted there that financial distress and reasonable prospect of rescuing it are the key factors to consider before passing a resolution to place a company under Business Rescue.

Under section 22(1) there is a window of opportunity for an affected person to challenge the Resolution to place the

Company under Business Rescue proceedings and to have the said Resolution set aside as well as the appointment of a Business Rescue Administrator.

It will be noted that the said window remains open from the date of the adoption of the Resolution to the time of the adoption of the Business Rescue Plan in accordance with section 43 of the Act. It is also significant to note, as argued by the Respondent, that the method to challenge the Resolution and the appointment of the Business Rescue Administrator is by making an application 'to a court for an order". The significance of the window within which to apply is that during that period, the Business Rescue Proceedings would not have commenced as the Rescue Plan would not have been adopted and for ease of reference we reproduce section 43 hereunder:

(1) A business Rescue Administrator shall at a meeting convened in accordance with section 42

(a) Introduce a proposal business rescue plan for consideration by the affected persons and where applicable by the shareholders.

(b) Inform the meeting on whether a reasonable prospect of the company being rescued continues to exist.

(c) invite discussion and conduct a vote on any motions to-

(i) amend the proposed plan as proposed and seconded by the affected person which have a positive effect on the business rescue plan or

(ii) adjourn the meeting in order to revise the plan for further consideration and

(d) Call for a vote for preliminary approval of the proposed business rescue plan or the plan as amended if applicable, unless the meeting has first been adjourned in accordance with sub section (2)(c)(ii)

Our understanding of this section is that there are no Business Rescue Proceedings until the procedure under section 43(1) has been completed. In that regard, an affected person who moves the Court under section 22 (1) seeks to prevent the company from going into Business Rescue proceedings by challenging the validity of the Resolution that seeks to place the company under Business Rescue Proceedings.

In light of what we have said, we now turn to the applicability of the moratorium under section 25 (1) to an application under section 22(1). Section 25(1) provides as follows:

> *"A legal proceeding shall not be brought against a company or in relation to any property belonging to the*

company or lawfully in its possession, during business rescue proceedings except- (underlining for emphasis only)

(a) with the written consent of Business Rescue Administrator.

(b) with the leave of the court and in accordance with any terms and conditions the court considers suitable in any particular matter related to the business rescue proceedings."

In his ruling the learned Judge formed the view that an action brought under section 22(1) of the Act is not a legal proceeding against the company.

We agree with this view because there is no demand or relief sought against the company. What is brought into question is its decision making process in passing the resolutions to place itself under Business Rescue and to appoint a Business Rescue Administrator. We need to emphasize the point that the moratorium prevents the bringing of legal proceedings against a company under Business Rescue Proceedings to protect its financial resources and property which are key to any rescue plan.

Having already found that Business Rescue Proceedings only commence after the provisions of section 43 have been complied with, being the validation of the Business rescue Plan by affected persons, we can only come to one conclusion, to the effect that section 25(1) is not applicable to applications

under section 22(1). We accordingly dismiss grounds 1 and 2 for want of merit.

13.1 COMMENCING AN ACTION

The arguments relating to whether or not the Respondent commenced the action properly when it moved the Court by Originating Summons are clear. Equally the law governing how an action is commenced is clear as the Supreme Court of Zambia and Rules of procedure have long settled the debate. We therefore think that any arguments contrary to the clear provisions of the law are as a result of a serious misapprehension of the law.

We however wish to start from section 22 itself which states that "an affected person may apply to a court for an order." We are not aware of any application that is made by filing a Writ of Summons. Ordinarily, a writ of summons is accompanied by a statement of claim thereby presupposing contentious issues resolvable by trial.

Secondly, an order of the Court is obtainable at chambers without a trial. It is therefore our considered opinion that even going by section 22(1) alone, we have a clear indication of the envisaged mode of commencement.

We however, also find the case of ***Chishala and others v Laston Geoffrey Mwale***[6] among others very clear in so far as

it gives meaning to Order 6 rule 1 of the High Court Rules. What comes out clearly from that Judgment is that to employ Originating Summons to commence proceeding, one must show that it is permitted under a rule or statute or it is a matter disposable at chambers.

We have already shown that in this case section 22(1) envisages commencement by Originating Summons. Secondly it is noted that the matter is capable of disposal at chambers However, because Order XXX rule 11 of the High Court Rules is couched in a manner that does not specifically catch the spirit of section 22 (1) of the Corporate Insolvency Act, its extension to the "law and practice for the time being observed in England and applicable to Zambia, beckons the aid of Order 5 rule 3 of the Rules of the Supreme Court 1999 edition which provides as follows;

> *"Proceedings by which an application is to be made to the High Court or a judge thereof under any Act must be began by originating Summons except where by these rules or by or under any Act the application in question is expressly required or authorized to be made by some other means. This rule does not apply to an application made in pending proceedings"*

This rule expressly catches the spirit of Section 22 of the Corporate Insolvency Act which provides for an application to be made to the High Court. We therefore uphold the learned

Judge's decision and find no merit in this ground and dismiss it accordingly.

13.2 CITATION OF THE APPELLANT

We note from the arguments proffered by the Appellant that an analogy is sought to be drawn between Receiverships 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 stark differences are seen in the powers that a receiver and a Business Rescue Administrator wield. Whereas a Receiver/Manager takes over the operations of the company at the expense of the Directors, a Business Rescue Administrator does not take over the management of the company. His powers are equated to those of Directors although he exercises oversight powers over the Directors of the company.

In other words, in a receivership, Directors cease to exercise their powers over the company while in a Business Rescue, Directors remain in situ. The other point to note is that whereas section 15 of the Corporate Insolvency Act explicitly

provides for the citing of a company as being in receivership, there is no such provision in relation to a Business Rescue.

It is therefore clear that a company under Business Rescue can be cited in its own name as is the practice in South Africa as demonstrated in the cases of ***African Banking Corporation of Botswana Ltd vs Kariba Furniture Manufacturers (PTY) Limited and others***[7] *and* ***Newport Finance Company (PTY) Ltd and another v Nedbank Ltd.***[8] We accordingly find no merit in this ground and we dismiss it accordingly.

14. CONCLUSION

In dealing with this appeal, we are cognizant of its novelty of the law on Business Rescue in this country. We are however, satisfied that we have given adequate guidance on the issues canvassed in the Court below and before us.

We therefore dismiss the appeal in its entirety but order each party to bear its own costs.

F.M. CHISANGA
JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

M.J. SIAVWAPA
COURT OF APPEAL JUDGE