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Chimanga Changa Limited v Export Trading Limited (SCZ Appeal No. 3 of 2022)

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Facts

The brief facts of the case are that the appellant and respondent entered into a contract for the supply of maize grain to the appellant, by the respondent valued at K9, 032, 713.05. However, in a surprising turn of events the appellant refused to take delivery of the whole consignment thereby prompting the respondent to commence legal action in the commercial division of the High Court, for breach of contract seeking among other reliefs, specific performance of the contract by the appellant.

The trial court entered judgement in favour of the respondent, a decision which aggrieved the appellant prompting it to appeal against the judgement in the Court of Appeal. However, unbeknownst to the respondent, two special resolutions were passed by the appellant's board of directors and members for the commencement of voluntary business rescue proceedings and the appointment of a business rescue administrator, respectively.[3]

The passing of the two resolutions was brought to the respondent's attention through a newspaper advert and acting through its counsel, when its efforts to inquire into the authenticity of the appellant's resolutions proved futile, the respondent was left with no choice but to challenge the proceedings in the High Court pursuant to the provisions of section 22 of the Corporate Insolvency Act 2017[4]. However, the Appellants filed a motion to raise preliminary issues[5]on several fronts chief among them being the nexus between sections 22 and 25 of the Act, the latter being a provision relating to moratorium or stay on legal proceedings against the company or its assets during ongoing business rescue proceedings. The motion was dismissed by the High Court in its ruling and subsequently also dismissed by the Court of Appeal when the appellants lodged an appeal whose grounds were based on the motions raised in the lower court.

The appeal was lodged in the supreme court on the grounds that:

That The Court of Appeal erred in law and fact when it upheld the holding of the High Court to the effect that there is no interplay between the provisions of section 22(1) and 25(1) of the Corporate Insolvency Act, 2017; The Court of Appeal erred in law and fact when it held that proceedings commenced under section 22(1) of the Corporate Insolvency Act, 2017 do not amount to legal proceedings against the company; The Court of Appeal erred in law and fact when it failed to take into account that both sections 22(1) and 25(1) fall under the same

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[3] The two respective special resolutions were passed pursuant to the provisions of section 21(1) relating to the resolution for the commencement of voluntary business rescue proceedings and section 21(3)(b) relating to the appointment of a business rescue administrator subsequent to the filing of the first resolution, with the Registrar of Companies.

[4] The provision allows any affected person to challenge the commencement of business rescue proceedings on grounds that thwe company is not financially distressed; there are no reasonable prospects of rescuing the business of the company; or that the procedural requirements of section 21 have not been satisfued.

[5] The said motion was filed pursuant to the provisions of orders 14A and 33 of the Rules of the Supreme Court Of England and Wales 1965, (White Book).

division of the Corporate Insolvency Act and to hold that there is no interplay between sections 22(1) and 25(1) offends the intention of the legislature in placing the safeguards in section 25(1).

Holding

The Supreme Court upheld the decision of the Court of Appeal only to the extent that an application made pursuant to section 22(1) of the Act, by an affected person seeking to challenge the propriety and legitimacy of the voluntary business rescue proceedings neither requires the consent of the business rescue administrator nor leave of court.

Significance

It should be considered a relief that the apex court in this jurisdiction has had occasion to pronounce itself on matters relating to business rescue, thereby setting precedent for future cases like *Chimanga Changa*[6]. The court's judgement is therefore significant for several reasons as highlighted herein.

Firstly, like the Court of Appeal, the Supreme Court acknowledged that the introduction of the concept of business rescue proceedings in the Corporate Insolvency Act was novel within our jurisdiction. The court further stated that this was done in response to government's deliberate policy to inculcate a rescue culture within the Zambian business circles with the aim of avoiding liquidation altogether[7], by possibly saving as many financially distressed companies as possible as envisaged by the Act. It is also worth noting at this juncture, that with financial distress and reasonable prospects of rescue[8] being the two condition precedents for the commencement of the voluntary mode of the proceedings, a company's financial distress is an early warning sign of insolvency which if not addressed through business rescue as soon as it arises, may result in insolvency within the next ensuing six months.[9] It follows therefore, that an insolvent company is incapable of being rescued as such rescue may come too little too late.

Section 3 of the Act thus defines the term 'business rescue' to mean:

> The process of facilitating the rehabilitation of a company that is financially distressed by providing for
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> (a) the temporary supervision of the company and management of its affairs, business and property;
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> (b) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; or
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> (c) the development and implementation, if approved in accordance with this Act, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities and equity in a
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> manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results

[6] *Chimanga Changa Limited v Export Trading Limited* (SCZ Appeal No. 3 of 2022).
[7] Chungu, Chanda (2021) "Chimanga Changa Limited v. Export Trading Limited CAZ Appeal No. 76/2020 and CAZ Appeal No. 053/2021," SAIPAR Case Review: Vol. 4: Iss. 2, Article 13 at page 62.
[8] As per section 21(1) of the Corporate Insolvency Act No. 9 of 2017.
[9] Section 2 of the Corporate Insolvency Act No. 9 of 2017.

in a better return for the company s creditors or shareholders than would result if the company was to be liquidated;

It can thus be deduced from the above cited provision that the gist of business rescue, is to hand over the management of the company to an external manager called the business rescue administrator, whose major responsibility it is to formulate a business rescue plan, setting out how he intends to turnaround the company's business and return it to profitability. This is therefore in line with one of the four paramount objectives of corporate insolvency namely to return a company to profitability where possible or practicable.[10]

Secondly, the Supreme Court also stressed that voluntary business rescue proceedings commence the moment a resolution passed by the board of directors and the members, is filed with the registrar of companies. In fact, the wording of section 21(1) explicitly indicates that the passing of the resolution as aforesaid, is subject to subsection 2(a) of the same section. Which essentially means that the resolution is only the first step in setting the scene for the commencement of this mode of business rescue. Section 21(1) provides as follows:

> 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
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> supervision, if the board has reasonable grounds to believe that
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> (a) the company is financially distressed; and
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> (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;
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> (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
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> (iii) realise the property of the company in order to make a
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> distribution to one or more secured or preferential
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> creditors.

Subsection (2) of the above provision further states:

> (2) A resolution made in accordance with subsection (1)
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> (a) shall not be adopted if liquidation proceedings have been
>
> initiated by or against the company; and
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> (b) becomes effective after it has been filed with the Registrar.

The above provision further highlights the fact that business rescue proceedings cannot occur simultaneously with liquidation proceedings as the two proceedings are in complete contrast with each other. The latter being a means to the end of the company, namely winding-up while the former is aimed at resuscitating, saving, and turning around the business of the company in the state of financial distress. But most importantly, the taking 'effect' of the resolution is

[10] Goode, R. *Principles of Corporate Insolvency Law* 3rd edition. (London: Sweet & Maxwell, 2010). The possibility or practicability of rescue is highlighted in section 21(1)(b) of the Corporate Insolvency Act No. 9 of 2017, namely that in addition to the company being 'financially distressed', 'there appears to be a reasonable prospect of rescuing the company'.

subject to its being filed with the registrar of companies. Thus, the filing is what actually commences the process. The supreme court's proper interpretation of this provision clarifies the court of appeal's turbid interpretation of the provision namely that the proceedings only commence upon the adoption of the proposed business rescue plan tabled before the affected persons by the business rescue administrator, in line with section 43 of the Act.[11]

Thirdly, as regards the interplay between sections 22(1) and 25(1) of the Act, the court adopted the literal interpretation of the two provisions and concluded that the former is not subject to the latter. Section 25 of the Act 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 proceeding, except

(a) With the written consent of the 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;
(c) As a set-off against any claim made by the company in any other legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings concerning any property or right over which the company exercises the powers of a trustee.

(2) A guarantee or surety by a company in favour of any person may not be enforced by any person against the company during business rescue proceedings, except with the leave of Court and in accordance with any terms and conditions the Court considers just and equitable in the circumstances.

(3) if any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of the time shall be suspended during business rescue proceedings.[12]

An interrogation of the above cited provision reveals that the said moratorium is in relation to the company, or to any assets belonging to the company or lawfully in its possession during business rescue. By that token, a further dissection of this provision reveals the following:

A legal proceeding in order to effect a moratorium within the ambit of section 25, must be one which , is authorized or sanctioned by law and brought or instituted in a court of justice or legal tribunal for the acquiring of a right or the enforcement of a remedy.[13] Furthermore, the South African case of *Van Zyl v Euodia Trust (Edms) Bpk*[14], the court stated that the ordinary meaning of 'legal proceedings' is a 'law suit' or a 'hofsaak'.

The provision further states that no legal proceedings shall be brought against any property belonging to the company or in its possession. The term "property" is defined in section 2 of the Act to mean:

> the assets of the company, including money, goods, choses in action and land, whether real or personal, legal or equitable and situated in Zambia or elsewhere, and obligations,

[11] section 43 of the Corporate Insolvency Act No. 9 of 2017.
[12] Corporate Insolvency Act No. 9 of 2017.
[13] Carson v beall, 55 Ohio App. 245, 9N. E. 2d 729, 731.
[14] 1983 (3) SA 394.

easements and every description of estate, interest and profit, present or future, vested or contingent and arising out of, or incidental to the property[15]

Thus, the definition of property in the Act for purposes of interpreting section 25 in the instant case, is wide enough to encompass both real property and things or choses in action.

Furthermore, the provision emphasizes that where an action is commenced in respect of the company's property, the property in question must be in the possession of the company to for the statutory moratorium to apply. The English case of *Re Atlantic Computer Systems Plc*[16], is thus instructive in this regard. In that case, the Court had an opportunity to consider the meaning of the phrase 'possession' in the context of a lessor-lessee agreement where the Lessee of equipment had sub-let equipment to a sub-lessee and in determining whether physical possession of the sub-lessee could be considered possession by the lessee, it was held that the sub-lessee's possession of the equipment could be considered to be the lessee's possession and therefore repossession of the equipment from the sub-lessee would amount to repossession from the lessee. On that premise, therefore, leave of court was required to facilitate the repossession. Thus, in the context of business rescue proceedings anything in the possession of the company or in the possession of its sub-lessees would be deemed to be lawfully in the possession of the company and therefore leave of Court or permission from the Business Rescue Administrator would be needed to institute legal proceedings.

Therefore, as was rightly stated by the Supreme Court, there is no interplay between Section 22 (1) (a) and Section 25 (1) of the CIA as the moratorium for legal proceedings is against the company and the company's property or the property in its possession. Therefore, this right which has given by the Act to affected persons under Section 22 (1) does not fall within the ambit of Section 25 (1), in that it is not a legal proceeding against the company per se but rather against the decision of the company to place the company under business rescue. Furthermore, it must be noted that it is not a legal proceeding against the company's property or the property within the lawful possession of the company therefore it is not covered by the moratorium under section 25 (1) of the Act.

Conterminous to the foregoing, the court also addressed its mind to what the statutory moratorium seeks to protect. When a company is undergoing business rescue proceedings, a plaintiff is precluded from suing or instituting court proceedings against the company, to enable them to enforce their rights against it. This is the case as the purpose of a statutory moratorium is to grant the company some breathing space to enable it to reorganize its affairs and can continue to be a going concern rather than it becomes insolvent and eventually being wound up.

Conclusion

The Supreme Court's decision in *Chimanga Changa*[17] *has* set a clear and resounding tone as well as a sound precedent in the Jurisprudence of Zambian Corporate Insolvency law, specifically in relation to how voluntary business rescue proceedings should be commenced, when they commence and most importantly that an application objecting to the commencement of business rescue proceedings pursuant to section 22(1), does not answer to the definition of a legal proceeding for purposes of effecting a moratorium within the confines of section 25 of the Act.

[15] Section 2 of the Corporate Insolvency Act No. 9 of 2017.
[16] [1992] Ch. 505.
[17] Ibid, supra note 6.