

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



2016/HPC/0337

**IN THE MATTER OF: SECTION 234 OF THE COMPANIES ACT
CHAPTER 388 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: AN APPLICATION ON THE PART OF
POSTNET ZAMBIA LIMITED FOR THE
APPROVAL OF THE SCHEME OF
ARRANGEMENT**

BETWEEN:

POSTNET ZAMBIA LIMITED

PETITIONER

AND

**WESTERN UNION ZAMBIA LIMITED (60th) AND
OTHER 93 CREDITORS OF POSTNET ZAMBIA**

RESPONDENTS

***Delivered in Open Court before Hon. Mr. Justice Sunday B.
Nkonde, SC at Lusaka this 14th day of December, 2016***

For the Petitioner : Messrs Corpus Legal Practitioners
For the 60th Respondent : Messrs Musa Dudhia & Company

J U D G M E N T

CASES REFERRED TO:

- 1) *Re Aglo-Continental Supply Company (1922) Ch.723*
- 2) *Re Doman Long & Co. Limited (1934) 1 Ch.635*
- 3) *Hindustan Lever & Anr vs State of Maharashtra & Anr Appeal (Civil) 8232 of 1996 of 18th November, 2003.*

LEGISLATION REFERRED TO:

- 1) *Companies Act, Chapter 388 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

- 1) *Charlesworths Company Law, seventeenth Edition.*

This Petition is filed by the Petitioner for sanction of the Scheme of Arrangement between the Petitioner and its Creditors pursuant to **Section 234** of the **Companies Act**.

The Petitioner is incorporated under the **Companies Act** as a Private Company Limited by Shares under Registration Number 119990042412 and having its registered Office at Suite GO2, Foxdale Court, Office Park, Plot No. 609, Zambezi Road, Roma in the City of Lusaka of the Lusaka Province of the Republic of Zambia.

The Petitioner runs Service Centre Models whose areas of focus are: The Provision of document Solutions and business services and products (including sale of Stationery and Consumables), Money transfer, payment services, Courier, Postal and Communication through its locations in Lusaka, Copper-belt and Southern Provinces of Zambia.

The Petitioner's shareholding is 55 per cent by Kleiner Apex and 45% by Kukula Fund 1 (through its nominee Standard Chartered Zambia Securities Nominees Limited).

It is averred shortly after incorporation, the Petitioner's business commenced and as at the end of 2015, the Petitioner had 17 outlets in the three Provinces mentioned above. The Petitioner has, however, faced operational problems to sustain its business such that as at February, 2016, the Petitioner was indebted to various Creditors to the sum of ZMW13,532,042-00 against the net Assets of the Petitioner which at 31st December, 2015 were worth only ZMW 4,652,227-00.

The Petitioner is, therefore, unable to fully settle the debts due to each one of its Creditors and if the Petitioner went into liquidation, the available Assets would only be sufficient to partly settle debts of preferential Creditors who are also the minority class of the Company's Creditors. Thus, the Petitioner made an Ex-parte application seeking permission of this Court to convene a meeting or meetings of its Creditors for the purpose of considering and if thought fit approving (with or without modification) a Scheme of Arrangement. This Court, by Order dated 14th March, 2016 permitted the meeting and appointed Mr. Tue Nyboe Andersen or failing him, Mr. Cuthbert Malidi to be the Chairperson of the meeting and directed the Chairperson to report the results to this Court.

The Order of the Court was with a direction that the copy of the Scheme of Arrangement, the explanatory Statement and a form of Proxy together with the Notice of convening the meeting be served

personally or by pre-paid mail addressed to each of the Creditors at their registered or last known addresses.

The meeting was held on 11th April, 2016 at Mulungushi Conference Centre in Lusaka under the Chairmanship of Mr. Anderson. The Creditors voted and the resolution submitted was that the Scheme of Arrangement was approved with modification and the required resolution passed at the meeting. The approval was by more than 75 % of Creditors in all classes of Creditors.

On 19th April, 2016, Mr. Anderson filed a report into Court by way of reporting back to the Court and later filed an amended report on 13th June 2016, pursuant to the Order of the Court dated 10th June, 2016. What followed was the Petition that the Scheme of Arrangement be sanctioned by the Court in order for it to be binding on the Petitioner. The Petitioner's claim is

- a) For an order that the Scheme of Arrangement be sanctioned by the Court so as to be binding on the Petitioner and its Creditors.***
- b) That costs be in the cause.***
- c) Such other Orders that may be made in the premises as the Court shall deem fit.***

At the hearing of the Petition, the Court ordered that the Petitioner also advertise the Notice of hearing twice in a newspaper of general circulation by way of Substitute Service on all Creditors in addition to the exhibited letters of service to the Affidavit of Service dated 23rd

August, 2016. The Petitioner did advertise the Notices of hearing, so the record shows.

Coming to the objections, two persons have filed objections to the Scheme of Arrangement. The First Objector is the 59th Respondent, MWAKA NAMBEYE, an employee of the Petitioner from 15th April, 2015 as Head of Compliance who appeared in person. She contends that the Scheme of Arrangement infringes on her rights as an employee because it is proposing that she forfeits entitlements which include Leave pay, Notice pay, Gratuity and Redundancy pay totaling K45,365.38 as at 30th January, 2016. The First Objector further contended that under the Scheme of Arrangement, the First Objector and other employees of the Petitioner will be paid only 21.8 per cent and the rest of her emoluments would have to be forfeited. The First Objector compared herself to the Directors who she claimed are secured Creditors of the Petitioner and who will have their loans transferred to equity and, therefore, not suffer financial loss that she will suffer.

The Second Objector is the 66th Respondent, GRANESIA PROPERTIES LIMITED represented by Learned Counsel from Messrs Solly Patel, Hamir and Lawrence. The objection, as I can see it, is on three issues; that the Petitioner did not serve all the Creditors with the necessary documents as ordered by the Court on 11th March, 2016, also that the Petitioner has not included other Landlords of the Petitioner and provided an account of how it has managed to service its rental arrears to those Landlords and other charges and lastly that there are serious Value Added Tax and Withholding Tax issues with Zambia

Revenue Authority arisen from the Petitioner's renting of the Second Objector's premises which the Petitioner has not attended to and which are prejudicial to the Second Objector if the Scheme and Arrangement was to be sanctioned before being attended to by the Petitioner.

In response to the aforesaid objections, the Petitioner's contention is that the sum of K45,356-38 as Notice pay, Gratuity and redundancy, was not yet accrued to the First Objector's contract of employment that expires on 31st May, 2017.

With respect to the Second Objector, the Petitioner agreed that the Second Objector was a Landlord of the Petitioner BUT that there are no Tax issues with the Zambia Revenue Authority that would be prejudicial to the Second Objector if the Scheme of Arrangement was to be sanctioned by the Court.

In so far as the 60th Respondent which appeared at the hearing by Learned Counsel is concerned, it supports the sanction of the Scheme of Arrangement by the Court.

From the above stated facts and contending arguments, the questions that arise for my consideration are as follows:

- 1. Whether on the basis of the objections raised and the circumstances of this case it would be unreasonable to sanction a Scheme of Arrangement.**

2. Whether the non adherence to the Court Order on service of the Notice convening the Creditors meeting, a copy of the Scheme of Arrangement, the Statement and form of Proxy vitiates an approved Scheme of Arrangement.

As can be observed, I have decided to separate the second question from the first although the second question forms part of the first question. This has been done purely to achieve clarity and completeness. With this in mind, the approach I will take is to have consolidated analysis of the law and then at the end answer the two questions separately.

The relevant provisions of **Section 234** of the **Companies Act** state as follows:

- “(2) Where a compromise or arrangement is proposed between –**
- (a) Company and its Creditors or any class of its Creditors, or**
 - (b) a Company and its Members or any class of its Members.**

The Court may, on the application of the Company or of any Creditor or Member of the Company, or in the case of a Company being wound up of the Liquidator, order a meeting of the Creditors, the class of Creditors, the Members or class of Members, as the case may be, to be convened, held and conducted in such manner as it thinks fit to consider the compromise or arrangement.

- (5) Unless the Court orders otherwise, the voting power at the meeting of Creditors ordered to be convened pursuant to this Section shall be assigned to the Creditors in proportion to the amount of the debt outstanding from the Company to each Creditor.
- (6) If a meeting, by extraordinary resolution, agrees to any compromise or arrangement, the compromise or arrangement -
- (a) shall be binding on all the Creditors Members or class of Members as the case may be;
and
 - (b) shall be binding on the Company if and when-
 - (i) it has been approved by order of the Court; and
 - (ii) a copy of the Order has been lodged with the Registrar.
- (7) Where an extraordinary resolution agreeing to a compromise or arrangement has been passed at a meeting convened pursuant to this Section, the Company or any person who was entitled to vote at the meeting may apply to the Court for approval of the compromise or arrangement.

- (8) **At the hearing by the Court of the application for approval of the compromise or arrangement, any Member or Creditor of the Company claiming to be affected thereby shall be entitled to be represented and to object.”**

The Learned Authors of **Charlesworths Company Law**, Seventeenth Edition at page 666 quoting Astbury J in the English case of **Re Anglo-Continental Supply Company**¹ that before giving its sanction of a Scheme of Arrangement, the Court has to see

“first, that provisions of the Statute have been complied with. Secondly, that the class was fairly represented by those who attended the meeting and that the Statutory majority are acting bonafide and not coercing the minority to promote interests adverse to those of a class whom they purport to represent; and thirdly, that the arrangement is such that a man of business would reasonably approve.”

The Learned Authors go on to state as follows:

“That judgment is to be made assuming that the intelligent and honest person was acting as a member of the class concerned and in respect of his interest.

Whilst the Courts are concerned to state that approving a scheme is not merely a matter of checking that all the procedural requirements of the sections have been met with, they are reluctant to interfere if the scheme has been approved by the correct majority.”

Therefore, the factual question is not whether the Scheme is reasonable, but whether a Creditor could reasonably have approved it. It has been said that it is not the Court's role to second guess decisions made by Creditors who are acting honestly, provided that they have sufficient information and enough time to properly consider their options (see the case of **Doman Long & Co. Limited**²).

A Scheme of Arrangement is intended to rescue a distressed Company and every Company Court has to also keep in mind the fact that the alternative to the Scheme is liquidation and end to a Petitioner Company.

In relation to objections, settled law that he who alleges must prove also applies.

In this case, it appears to me that the First Objector's complaint is that the Scheme is unfair because it will achieve the taking away of her accrued and future benefits. My view on the accrued benefits is that the First Objector's contention is understandable from a moral angle but this Court has no moral role in a Scheme of Arrangement.

In the Petition to sanction the Scheme of Arrangement, the Court is not sitting as an Appellant Authority to closely scrutinize the Scheme and even substitute the democratic will of the parties to the Scheme with the Court's view of what is fair or if a better Scheme can be formulated. The Court's role in the Scheme is only supervisory to ensure that the Scheme is not unfair, contrary to public policy, unconscionable or against the law. There is, therefore, no merit in this objection.

As to the First Objector's contention that if the Scheme is sanctioned will take away her future benefits, it is trite law that future considerations cannot form part of the Court's role when determining whether to sanction a Scheme of Arrangement. Similarly, there is no merit in this objection.

In any case, in terms of employment benefits, it cannot be suggested that the First Objector would be better off in the option of liquidation of the Petitioner.

Further, the First Objector alleges that the Directors of the Petitioner Company will have their loans transferred to equity and, therefore, not suffer financial loss that she will suffer. However, this allegation has not been proven and remains a mere allegation which cannot make the Court interfere with the Scheme.

The final position I take on all the First Objector's objections is that all the objections are unmeritorious.

With regards the Second Objector, the dispute with the Petitioner on possible future tax obligations with the Zambia Revenue Authority is also not sufficient to sustain an objection to the Scheme. This objection, whose facts are also denied by the Petitioner, pertains to what may happen in future which the Court cannot consider at this juncture when determining whether to sanction the Scheme.

The other argument put forward and in a very robust way by the Second Objector is to the effect that the Scheme should not be sanctioned because the parties failed to adhere to the Court Order to serve the Notice convening the Creditor's meeting, a copy of the Scheme of Arrangement, the Statement and Form of Proxy on all the Creditors.

I find a lot of difficulty in understanding and agreeing with this objection. The Second Objector has not named any Creditor who it alleges was not served or has any Creditor come forward to allege that service was not effected on it. The onus has been on the Second Objector to prove the allegation which it has failed to do.

But assuming the allegation was true, I still do not see how such non – service can vitiate a Scheme of Agreement reached by the parties to it and when the uncontroverted evidence on record is that the majority of the Creditors and their respective classes approved the Scheme as required by **Section 234** of the **Companies Act**. These Creditors are also assumed to have known the Agenda of the meeting which was for the purpose of considering and if thought fit approving (with or without modification) a Scheme of Arrangement.

In my view, what is required is for the Petitioner to be in substantial compliance with the requirements of the law as set out in **Section 234(2)** of the **Companies Act** which I find the Petitioner did as evidenced by the passing of the extraordinary resolution approving the Scheme by the requisite majority vote of the Petitioner's Creditors.

All the above stated, I now come back to specifically provide the answers to the two questions herein for determination;

- (i) ***Whether on the basis of the objections raised and the circumstances of this case it would be unreasonable to sanction the Scheme of Arrangement.***

The answer is that it would not be as the objections raised essentially relate to seeking the Court to interfere with the democratic choice of the parties to the Scheme of Arrangement. I have looked at all the objections raised and I find that they are not maintainable at law. By way of emphasis, I wholly adopt a passage in the Supreme Court of India case of **Hindustan Lever & Anr vs State of Maharashtra & Anr** that

“ It is the Commercial wisdom of the parties to the Scheme who have taken an informed decision about the usefulness and propriety of the Scheme by supporting it by the requisite majority vote....”

This is settled law.

- (ii) Whether the non adherence to the Court Order on service of the Notice convening the Creditors meeting, a copy of the Scheme of Arrangement, the Statement and form of Proxy vitiates an approved Scheme of Arrangement.**

The answer to this is that such non adherence does not vitiate the approved Scheme of Arrangement where it is clear that the approval was done by the requisite majority vote of the Creditors with their eyes open as to the nature of the business they were transacting at a Creditor's meeting as in the circumstances of this case.

In a nutshell, having reviewed the Scheme of Arrangement, I am satisfied that

- (i) the relevant statutory requirements have been complied with.**
- (ii) the classes of Creditors were properly identified.**
- (iii) each class was fairly represented at the Creditor's meeting held on 11th April, 2016.**
- (iv) the statutory majority was acting bona-fide in the process.**
- (v) it would be reasonable to approve the Scheme.**
- (vi) on the basis of material on record, it has been demonstrably established that the majority of the**

parties to the Scheme supported the Scheme.

I consequently Order as follows

1. **The Scheme of Arrangement herein is sanctioned by this Court as prayed.**
2. **The Petitioner is directed to file a copy of this Order along with a copy of the Scheme of Arrangement with the concerned Registrar of Companies.**
3. **All concerned regulatory Authorities to act on a copy of this Order along with the Scheme of Arrangement.**
4. **The Petitioner to bear the costs of the Petition.**

Dated at Lusaka this 14th day of December, 2016.



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE