

BETWEEN:

CHIMANGA CHANGA LIMITED

APPLICANT

AND

EXPORT TRADING LIMITED

RESPONDENT

CORAM: Chishimba, Banda-Bobo and Muzenga, JJA

On 4th March, 2022 and 30th March, 2022

For the Appellants: Mr. W. Chirwa of Messrs J and M Advocates

For the Respondent: Ms. K. Tembo of Messrs Milner & Paul Legal
Practitioners

R U L I N G

CHISHIMBA, JA, delivered the ruling of the Court.

Cases referred to:

1. Bidvest Food Zambia Limited & Others v CAA Import and Export Limited
SCZ Appeal No. 56 of 2017
2. Standard Chartered Bank Limited v Celine Nair SCZ/32/2019
3. Savenda Management Services v Stanbic Bank Limited SCZ Number 10
of 2018
4. Cavmont Bank Ltd v Spancrete Zambia Limited & 2 Others
Nom/15/2019
5. Bidvest Food Zambia Limited & Others v CAV Import & Export Limited
Appeal No. 56 of 2017

6. Smith, Hogg and Co Limited v The Black Sea and Baltic General Insurance Co. Limited (1940) 67 LL.LL Rep 253

Legislation referred to:

1. Court of Appeal Act No. 7 of 2016 of the Laws of Zambia.
2. Court of Appeal Rules Statutory Instrument No. 65 of 2016.
3. Supreme Court Act Chapter 25 of the Laws of Zambia.
4. The Rules of the Supreme Court of England, 1999 Edition (white Book).
5. The Corporate Insolvency Act, 2017.

This is an application for leave to appeal to the Supreme Court, and for an order to stay execution of the judgment of the Court pending hearing and determination of the appeal. The application is made pursuant to **section 13 of the Court of Appeal Act No. 7 of 2016**, and **Order 11 and 10 Rule 5 of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016** as read with **Rule 51 of the Supreme Court Rules** and **section 24(b) of the Supreme Court Act Chapter 25 of the Laws of Zambia**.

The applicant seeks leave to appeal against our judgment dated 10th December, 2021 on the ground that the intended appeal raises novel issues of public importance relating to:

- i) *Whether the mandatory provisions of section 22(3) Corporate Insolvency Act (CIA) can be overlooked by a court where an affected party making an application to set aside business*

rescue proceedings omits to serve its application on all affected persons in accordance with the said section of the CIA;

- ii) Whether it is proper to allow a party that has breached the mandatory provisions of section 22(3) of the CIA to proceed with its application and to place the burden of non-compliance of section 22(3) of the CIA and raising issue with such a breach on affected parties that are not even aware of such court proceedings;*
- iii) The intended appeal as the grounds disclosed in the draft memorandum of appeal exhibited in the affidavit in support of this application raise novel issues which have never been litigated in our superior courts and also raise issues of public importance and have reasonable prospects of success;*
- iv) The intended appeal to the Supreme Court meets the threshold set under section 13 of the Court of Appeal Act, 2016.*

The applicant relied on the affidavit in support deposed to by Sokwani Peter Chilembo, the Group Legal Counsel. Counsel deposed that in our judgement dated 10th December, 2021, we held in favour of the respondent on all grounds of appeal and upheld the judgment of the High Court. The applicant is desirous of appealing to the Supreme Court. That the intended appeal raises sound legal questions fit for consideration by the apex court as can be gleaned from the draft notice of appeal and memorandum of appeal exhibited and marked “**SPC 1**” and “**SPC 2**” respectively. The applicant

proceeded to highlight the issues intended to be raised on appeal as follows:

- 1) The issue that this court failed to address the misapprehension of facts by the lower court when it held that there were no prospects of success alluded to by the appellant in the lower court when in fact, the prospects were there and alluded to though, found to be insufficient by this court;
- 2) That this court failed to address the wrongs of the respondent thereby leaving a lacuna as the court did not grant any clear direction and recourse to affected parties not served with court proceedings. That in essence, this court transferred the burden of non-compliance of the provisions of section 22(3) of the CIA on innocent parties;
- 3) That the Supreme Court needs to determine whether the respondent can go unpunished for not complying with the provisions of section 22(3) of the CIA and yet the appellant was punished for purportedly “not complying” with the CIA;
- 4) That the CIA having been enacted in 2017, the issues presented before this court and the lower court are novel

issues of public interest which have a high prospect of success before the apex court.

According to the deponent, the issues raised herein have not been extensively adjudicated upon by the appellate courts in this country. Further that the intended grounds of appeal have reasonable prospects of success. That on the above basis, the intended appeal is a fit and proper case for us to grant leave to appeal and order that execution of the High Court Judgment be stayed pending the hearing and determination of the appeal in the Supreme Court.

Heads of argument were filed in support of the motion in which the applicant submits that the appeal raises novel issues and points of law of public importance regarding the procedure that pertains to the interpretation of **Sections 21 and 22 of the CIA** such as service of the respondent's application to set aside the resolution to commence Business Rescue Proceedings on all affected parties. That we placed the burden in respect of non-service on the affected parties without giving direction as to how affected persons would be notified of the proceedings for them to make the necessary objections as the CIA makes no provision for this.

It was contended that the appeal has reasonable prospects of success because we failed to pronounce ourselves on pertinent issues. Further that the intended appeal meets the threshold set out in **Section 13 of the Court of Appeal Act**.

The case of **Bidvest Food Zambia Limited & Others v CAA Import and Export Limited** ⁽¹⁾ was cited where the court stated that:

“... where there is a discernible public interest or public policy concern in the anticipated elucidation by the Supreme Court of a point of law in what is otherwise litigation between private parties, there is a definite possibility that such point of law would be one of public importance notwithstanding its private genesis.”

Further, reliance was placed on **Standard Chartered Bank Limited v Celine Nair** ⁽²⁾ where the court pointed out that the impact and consequences of a point of law of public importance warranting the attention of the Supreme Court must be substantial, broad based, transcending the litigation interest of the parties and bearing upon public interest.

With respect to the application for stay of execution, it was submitted that if leave to appeal to the Supreme Court is granted, it would be in the interests of justice to reinstate the order for stay of execution of judgment pending determination of the appeal. This will

maintain the status quo pending determination of the appeal and that the intended appeal will not be rendered an academic exercise. In support of the above arguments, reliance was placed on **Order 10 rule 5 of the CAR** and **Rule 51 of the Supreme Court Rules**.

The respondent opposed the motion for leave to appeal to the Supreme Court and relied upon the affidavit and skeleton arguments dated 24th February 2022. The respondent deposed that the intended appeal has no merit, is frivolous and vexatious.

In respect of the intended grounds of appeal, the respondent stated that they all lack merit, that the court of appeal went to great length to show that **Section 22 (3) of Corporate Insolvency Act** had been complied with, that the applicant was the wrong party to advance the claim for failure to serve affected parties. Further that there is no lacuna in the judgment left by the court to warrant clarification by the apex court.

The deponent went on to state that though the issues raised in the intended appeal are novel to the Zambian jurisdiction, they are not automatically appealable to the Supreme Court. The issues on appeal are not of public interest and are likely to fail on appeal to the

Supreme Court. The intended appeal does not disclose matters fit for consideration by the apex court.

Therefore, leave to appeal and to stay execution should not be granted because the applicant has not satisfied the conditions for the grant of leave to appeal and an order for stay of execution.

The respondent in its arguments, made reference to **Section 13 (3)** of the **Court Appeal Act** and to the case of **Savenda Management Services v Stanbic Bank Limited** ⁽³⁾ in which the Supreme Court set out the permissible grounds for the grant of leave to appeal in civil matters.

It is contended that the purported novel issues i.e the interpretation of **Sections 21 and 22** of the **Corporate Insolvency Act** raised by the applicant were adequately addressed by the court. In respect of the argument that we placed the non-service of the respondent's application on affected parties instead of the respondent, and neglected to give direction as to how affected parties would be notified of the proceedings for them to make necessary objections as CIA Act is silent, this court in detail determined the issue of service and held that the High Court had jurisdiction to hear

and determine the matter. That it was for the party affected by the purported improper service to raise the issue. In fact at the time of service of the application, the CIA had not provided the prescribed form through which service would be made. No complaint was received from the alleged affected parties from commencement to determination of the matter.

The respondent submits that the purported novel issues raised by the appellants were addressed and does not warrant the Supreme Court's determination. Further that the issues raised are not of public importance. The case of **Cavmont Bank Ltd v Spancrete Zambia Limited & 2 Others** ⁽⁴⁾ was cited in which we touched on public interest and held that a point of public importance had not been raised to warrant the Supreme Court's attention because the issues were already deliberated upon and sufficient guidance given.

Reference was made to the case of **Bidvest Food Zambia Limited & Others v CAA Import & Export Limited** ⁽⁵⁾ where the Supreme Court stated that the novelty of a matter does not in itself or of itself alone turn a matter into one that raises a point of law of public importance within **Section 13 (3) of the Act**. It is argued that a novel point of law should pass the threshold of wider public

importance which the said proposed grounds of appeal have not met. The respondent also contends that the issue raised shall never affect business rescue proceedings in Zambia for the sole reason that the prescribed form has now been provided under **Form V of the CIA Act under the Corporate Insolvency (Forms and Fees) Regulations**. The issue herein will not cover a wide range of companies/affected persons but will be limited to the parties herein. Therefore, no issue of public importance to be determined arises.

As regards the reasonable prospects of success, the respondent submits that the grounds of appeal intended to be raised are frivolous and vexatious aimed at prolonging litigation. That we should disregard the accusation of unbalanced evaluation of the issues and dismiss the motion.

In respect of the stay of execution of judgment pending appeal, it is submitted that the judgment in issue is not a money judgment capable of execution to the detriment of the applicant. There are no reasonable prospects of success of the appeal, intended to serve the interest of third parties (affected persons) who have shown no interest in the proceedings.

That having held in our judgment that the BRA appears to be an attempt to avoid and postpone payment of the respondent's debt and not to achieve the goals of business rescue, the intended appeal should be viewed without merit and not used as an instrument to achieve the unfair intentions of the applicant to the respondent's detriment. The case of **Smith, Hogg and Co Limited v The Black Sea and Baltic General Insurance Co. Limited** ⁽⁶⁾ was cited where it was held that a stay of execution pending appeal is granted under very exceptional circumstances for instance where execution would destroy the subject matter of the action or deprive the appellant of means of prosecuting the appeal. It was submitted that the stay of execution should not be granted because the appeal is academic.

We have considered the motion for leave to appeal to the Supreme Court and to stay execution of our judgment pending appeal, the affidavits on record and the skeleton arguments by the respective parties. **Section 13(3) of the Court of Appeal Act** provides for the grant of leave to appeal against a judgment to the Supreme Court. The provision stipulates that leave to appeal will be granted where the Court of Appeal considers that:

(a) The appeal raises a point of law of public importance;

- (b) **It is desirable and in the public interest that an appeal by the Supreme Court.**
- (c) **The appeal would have a reasonable prospect of success.**
- (d) **There is some other compelling reason for the appeal to be heard.**

Further the leave to appeal does not operate as a stay of execution. The Supreme Court in the case of **Bidvest Food Zambia Limited & Others v CAV Import & Export Limited** ⁽⁵⁾ in considering the import of **Section 13** particularly **subsection 3 (a)** dealt with the point of law of public importance *vis a vis* a novel issue. The court stated that the novelty of a matter does not in itself and of itself alone turn a matter into one that raises a point of law of public importance.

The main reason advanced by the applicant for leave to appeal to be granted, is that the intended appeal raises novel issues and points of law of public importance regarding the procedure pertaining to the interpretation of **sections 21 and 22 of the CIA**. In particular, service of the respondent's application to set aside the resolution to Commence Business Rescue Proceedings on all affected parties. It has been contended that we placed the burden of service on the affected parties without giving direction as to how affected persons

would be notified of the proceedings for them to make the necessary objections as the CIA makes no provision for this.

A perusal of our judgment at page J.52 to J.54, shows that we addressed the issue being raised as regards notification of the employees of the affected company. We stated that the issue is what is the effect of non-service on all affected persons of the application to set aside the business rescue resolution to commence business rescue proceedings. In our judgement at pages J.53 to J. 54, we guided As follows:

“We are of the view that it is for the 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 the other parties deemed affected parties.

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 the CIA and argue the lack of jurisdiction by the court to proceed against a party who was not served or notified of the application.

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 the other affected

parties who are alleged not to have been notified in the prescribed manner.”

We dealt with the issues raised by the applicant, which in our view are not novel issues or points of law of public importance. Even the issue pertaining to the interpretation of **sections 21 and 22 of the CIA**, cannot be considered novel issues of public importance.

Therefore, we are of the view that the application for leave to appeal has not met the threshold under **Section 13 (3(a)** of the **Court of Appeal Act**. Further we see no prospects of success. The application for stay of execution is equally dismissed having been dependent on the leave to appeal. The motion is accordingly dismissed with costs to the respondent.



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F. M. Chishimba

COURT OF APPEAL JUDGE



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A. M. Banda-Bobo

COURT OF APPEAL JUDGE



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K. Muzenga

COURT OF APPEAL JUDGE