IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 3 OF 2022**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

CHIMANGA CHANGA LIMITED **APPELLANT**

AND

EXPORT TRADING LIMITED **RESPONDENT**

Coram	:	**Wood, Kajimanga and Mutuna JJS**
		On 10th May 2022 and 29th September 2022
For the Appellant	:	**Mr. J. Madaika and Mrs. Z. K. Chirambo of Messrs J and M Advocates**
For the Respondent	:	**Mr. M. J. Katolo, Mrs. K. Tembo, Mrs. H. Musa, Mrs. T. Banda – Chasaya and Mr. M. Katungu of Messrs Milner and Paul Legal Practitioners**

J U D G M E N T

Mutuna JS delivered the judgment of the court.

Cases referred to:

1) **Mazoka and others v Mwanawasa and others (2005) ZR 138**
2) **ZEGA Limited v Zambia Revenue Authority – appeal number 96 of 2018**

3) **Thomas Cook v Mortgage Debenture Limited (2016) 3 ALL ER 975**
4) **Matilda Mutale v Emmaunel Munaile (2007) ZR 118**
5) **Attorney-General and another v Lewanika and others (1994) ZR 1**
6) **Eastern Holdings Establishment of Vaduz v Singer and Friedlander Limited (1967) 2 ALL ER 1192**
7) **Humber and Co. v John Griffiths Cycle Co. (1901) 85 LT 141**
8) **David Jacque Richter ABSA Bank Limited (20181/2014) 2015 ZA SCA 100(01 June 2015)**

Legislation referred to:

1) **The Corporate Insolvency Act, number 9 of 2017**
2) **High Court Act, Cap 27**
3) **Companies Act, (South Africa) number 71 of 2017**
4) **The Interpretation and General Provisions Act, Cap 2**

Works Referred to:

1) **Black's Law Dictionary, 7th Edition, by Beryan A. Garner, West-Group, USA**

Introduction

1) In 2017 the landscape of Zambian company law changed drastically with the enactment of the ***Corporate Insolvency Act*** (the Act) which introduced, among other things, the concept of business rescue. The Act has its origins in a deliberate policy by government to provide a

temporary reprieve for companies that may be in distress to prevent them from going into liquidation, a practice which, hitherto, had proved to have an adverse effect on the business sector and livelihoods of many employees in the country. It is modelled on chapter 6 of the South African ***Companies Act***, number 71 of 2008 and its provisions mirror the said Act.

2) The purpose for which the Act was enacted is defined in the Preamble and encompasses provision for corporate receiverships, liquidations, winding up and business rescue; the appointments, duties and responsibilities of receivers, liquidators and business rescue administrators; and, proceedings arising from such appointments.

3) The appeal in this matter addresses two aspects of the Act: the concept of business rescue and practice and procedure. It arises from a decision of the Court of Appeal which upheld the decision of a High Court Judge, Chenda, J on: the interpretation of sections 21, 22 and 25 of the Act; form and content of the originating process; and,

procedure for challenging a resolution by a company placed in business rescue proceedings.

Background

4) The Appellant, a grain miller, was engaged in business with the Respondent, a supplier of grain. For this reason, the two parties entered into a contract in terms of which the Respondent agreed to supply to the Appellant maize grain valued at K9,032,713.05. The Appellant breached the agreement by failing to accept delivery of the whole consignment contracted to be delivered, prompting the Respondent to take out an action in the High Court against the Appellant, for among other things, specific performance.

5) After the High Court Judge heard the matter, she entered judgment in favour of the Respondent. The Appellant appealed against the judgment to the Court of Appeal. While the appeal was pending before the Court of Appeal, in September 2019, the Appellant's board of directors and members passed and registered two special resolutions

placing the Appellant under business rescue proceedings and appointed Mando Mwitumwa, a legal practitioner, as business rescue administrator pursuant to section 21(1) and (3) (b) of the Act, respectively.

6) The Respondent became aware of the Appellant's resolution by way of a newspaper advert and instructed its counsel to request the business rescue administrator to provide it with proof of the Appellant's alleged financial distress warranting the steps taken. It also requested the business rescue administrator to provide proof of his registration at the Patents and Companies Registration Agency (PACRA) as an insolvency practitioner.

7) The Appellant did not respond to the Respondent's request prompting it to apply to court challenging the steps taken by the Appellant.

Application before the High Court

8) The Respondent launched its action by way of originating summons pursuant to sections 21 and 22 of the Act, as

read with Order 30 rule 11 of the ***High Court Rules***. The relief sought was as follows:

8.1 An order to set aside the business rescue proceedings instituted by the Appellant;

8.2 An order to set aside the appointment of the business rescue administrator;

8.3 An order for the interpretation of sections 21 and 22 of the ***Corporate Insolvency Act*** as regards breach of the said provisions;

8.4 Further or other reliefs as the court may deem fit;

8.5 Interest;

8.6 Costs of and incidental to the action.

9) After the process was served upon the Appellant it filed a motion pursuant to orders 14A and 33 of the ***Rules of the Supreme Court 1965,*** (***White Book***) challenging the: jurisdiction of the court on the ground that the consent of the business rescue administrator or leave of the Court had not been obtained prior to institution of the court proceedings; mode of commencement of the action; and, the parties to the action. It sought the dismissal of the

Respondent's action. The Respondent opposed the preliminary objection both on the merits and the propriety of the application.

Decision by the High Court Judge

10) The Learned High Court Judge heard the application and delivered his ruling on 3rd March 2020. He began by addressing the Respondent's challenge to the manner in which the Appellant launched the motion to dismiss action, by setting out the threshold to be met by an applicant under Order 14A rule 2 subrule 3 and the requirement under Order 33 rule 3 subrule 1 of the ***White Book***. According to the Judge, non-compliance with these provisions would amount to an irregularity in terms of Order 2 rule 1subrule 1 of the ***White Book***.

11) The Judge went on to hold that in terms of Order 2 rule 2 and explanatory note at 2/2/4 of the ***White Book***, a party will be considered to have waived the right to redress an irregularity if the party takes fresh steps which would only have been taken if the irregularity did not exist. He noted

that despite raising the irregularity, the Respondent had still gone ahead and filed an affidavit and arguments in opposition to the motion it was challenging. This, he concluded, was a waiver of its right to challenge the propriety of the motion and held that the motion was properly before him and he could consider it.

12) Regarding the jurisdictional issue raised based on the fact that the Respondent had not either obtained written consent of the Appellant's business rescue administrator or leave of court before commencing the action, the Judge began by holding that section 22(1) of the Act confers a statutory right to any affected person to apply to court to object to a resolution to begin voluntary business rescue proceedings. The Judge then referred to the provisions of section 25 of the Act on the moratorium of legal proceedings against a company undergoing business rescue proceedings. He identified the issue for determination as being, whether or not the statutory right conferred by section 22(1) is subject to the restriction under section 25.

13) In answer to the question posed, the Judge began by stating the literal rule on statutory interpretation in accordance with the decision of this Court in the case of ***Mazoka and others v Mwanawasa and others***[1]. He then set out the provisions of section 22(1) of the Act which he noted to be subject only to subsection (2) and not section 25(1) of the Act and concluded that the right of an affected party under section 22(1) is not subject to the moratorium against legal proceeding under section 25(1).

14) The Judge rationalized his findings by holding that an application made pursuant to section 22(1) of the Act is not a legal proceeding against a company undergoing business rescue proceedings, but rather an action to challenge the validity of a resolution to commence voluntary business rescue proceedings. Further, the subject matter under a section 22(1) application is not the company but the decision by such a company to go into voluntary business rescue proceedings both in terms of the procedure and merit.

15) The Judge said that the converse is what is applicable under section 25(1) where there is a restriction on legal proceedings against a company which is under business rescue proceedings and not a restriction on proceedings to challenge the decision to place a company in business rescue proceedings. Consequently, he concluded that the Respondent did not require the consent of the business rescue administrator or leave of court prior to commencing the action.

16) The second challenge the Judge addressed related to the propriety of the originating process, regard being had to the claims and contentious nature of the issues raised. The Appellant's position was that the Respondent should have commenced the action by way of a writ of summons and not originating summons. It questioned the Respondent's reliance on Order 30 rule 11 of the ***High Court Act*** in launching the action.

17) In his determination of the issue, the Judge observed that section 22 of the Act upon which the action was premised, the rest of the Act and subsidiary legislation, as well as the

High Court Act, do not stipulate the mode of commencement of an action for the relief sought. He clarified that he had referred to the ***High Court Rules*** because the Act provides for actions under section 22(1) to be made to the *"court"* which is defined in section 2 as the *"High Court"*.

18) By way of conclusion, the Judge held that prior to the promulgation of court proceedings rules under the Act a statutory application under section 22(1) must be brought by way of originating summons.

19) The third issue the Judge tackled related to the challenge that the title of the action should have stated the fact that the Appellant was being sued as an entity in business rescue proceedings. In other words, the originating process should have described the Respondent as *"Chimanga Changa Limited (under "Business Rescue Proceedings")*. He explained that the Appellant in justifying its challenges had asked him to draw an analogy with what the law prescribes where a company is in receivership

because there is a shift in *locus standi* from the company to the business rescue administrator.

20) The Judge found that unlike the provisions of the Act relating to business rescue, those relating to receivership specifically state, under section 15, that the status of receivership must be mentioned alongside the name of the company. Secondly, the Act is specific in its recognition of the shifting of *locus standi* to the receiver in receivership proceedings and provides for liability of the receiver on the contracts of the company and for disposal of company assets by the receiver.

21) In contrast, there is no liability against the business rescue administrator on the contracts of the company and his power is confined to management and control of the company. Further, the power to sell assets of the company under business rescue proceedings is exercisable in the name of the company as is the power to perform other acts. Following these findings, the Judge rejected the Appellant's contention that it had wrongly been named in

the proceedings. He accordingly dismissed the Appellant's preliminary objection.

Appeal to the Court of Appeal and decision by the court

22) The Appellant was unhappy with the decision of the High Court Judge and appealed to the Court of Appeal fronting four grounds of appeal. The grounds of appeal contested the holding by the Judge that the Respondent did not require the consent of the Appellant's business rescue administrator or leave of court to launch its action.

23) In addition, the grounds of appeal challenged the holding by the Judge that the proceedings before him were not proceedings against a company but an action to challenge the validity of a resolution to commence business rescue proceedings. They also challenged the mode of commencement of the action and the manner in which the Appellant was named as a party.

24) The arguments presented by the parties in the Court of Appeal were similar to those presented before the High Court Judge. We have, therefore, not reproduced them

here but have referred to the relevant ones in our consideration of the appeal.

25) The Court of Appeal agreed entirely with the findings and holdings by the High Court Judge. In its interpretation of the provisions of section 21 of the Act, the Court of Appeal went further to hold that while section 21 of the Act provides for procedure by which a company may be placed under business rescue proceedings, section 22(1) is a window of opportunity for an affected person to challenge the resolution to place the company under business rescue proceedings for purposes of setting aside the resolution.

26) According to the Court of Appeal, the window of opportunity for affected persons remains open from the date of adoption of the resolution to place a company under business rescue proceedings to the time of adoption of the business rescue plan by affected persons, in accordance with section 43 of the Act. During this period, business rescue proceedings will not have commenced because the business rescue plan was pending approval.

Therefore, an application made under section 22(1) seeks to prevent the company from going into business rescue.

27) The Court of Appeal went on to agree with the learned High Court Judge that an action under section 22(1) of the Act is not a legal proceeding against the company because there is no demand or relief sought against the company. The application looks at the decision making process which precedes the passing of the resolution to place a company under business rescue proceedings. The Court accordingly dismissed the appeal in its entirety prompting the Appellant to appeal to this court.

Grounds of appeal to this Court and arguments by the parties.

28) The Appellant has raised three grounds of appeal as follows:

28.1 The Court of Appeal erred in law and fact when it up-held 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;

28.2 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;

28.3 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 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).

29) Before the hearing, counsel for both parties filed heads of argument which they relied upon at the hearing and which they complimented with *viva voce* arguments.

30) Counsel for the Appellant, Mr. J. Madaika and Mrs. Z.K. Chirambo argued grounds 1 and 2 together. They began by stating the rationale of the Act. They then set out the background to the action in the High Court emphasizing the fact that prior to commencing the action the Respondent did not obtain written consent of the business

rescue administrator or leave of court and concluded that this breached the provisions of section 25(1) of the Act.

31) The position taken by counsel was that, the effect of the provisions of section 25(1) of the Act is that there can be no legal proceedings brought against the Appellant without the written consent of the business rescue administrator or leave of the court. The need for written consent is mandatory because the word *"shall"* is used in the section in line with the decision of this Court in the case of ***ZEGA Limited v Zambia Revenue Authority***[2] in which the effect of that word was discussed.

32) Advancing their argument on the issue, counsel drew our attention to a decision of the Court of Appeal, England and Wales, in the case of ***Thomas Cook v Mortgage Debenture Limited***[3] which had occasion to discuss the provisions of section 25(1), paragraph 43(6) of Schedule B1 of the English ***Insolvency Act 1986*** which are similar to the provisions of our section 25(1). The case sets out the rationale for the moratorium against suits in respect of companies in liquidation and the type of actions in which

the moratorium applies as being those against the company. Counsel contended that the case concluded that it is mandatory for a person seeking to launch an action against a company which has gone into administration to obtain consent of the administrator or permission of the court. Further, such consent or permission is required where the action sought to be launched is offensive rather than defensive in nature.

33) Drawing a parallel between the facts of this case and those in the ***Thomas Cook***[3] case, counsel argued that since the Respondent's application to set aside the resolution under section 22(1) was offensive because it was launched by the Respondent against the Appellant, a company undergoing business rescue proceedings, consent of the business rescue administrator or permission of the court was necessary prior to launching the action.

34) Counsel concluded that the Court of Appeal misdirected itself when it held that there is no interplay between sections 22(1) and 25(1) of the Act and that the application to challenge the validity of the resolution were not

proceedings against a company in business rescue. They drew our attention to the definition of the phrase *"legal proceedings"* in ***Black's Law Dictionary*** and contended that it is all encompassing and includes the application which was before the High Court Judge.

35) The thrust of the arguments by counsel under ground 3 of the appeal was that since sections 22(1) and 25(1) of the Act are in the same part of the Act, they should be read together and not in isolation of each other. They argued that the courts are also compelled to acknowledge the fact that certain sections are in the same part of an Act in accordance with section 10 of the ***Interpretation and General Provisions Act***. The section reads as follows:

> **"When a written law is divided into parts, titles or other subdivisions, the fact and particulars of such divisions and subdivisions shall, with or without express mention thereof in such written law, be taken notice of in all courts for all purposes whatsoever."**

According to counsel, sections 22(1) and 25(1) *"must be read together and in their entirety, each throwing light on and illuminating the meaning of the other"*.

36) Counsel argued that when interpreting the two sections we must have regard to the aim, objective and scope of Part III of the Act and that the two sections must be read in conjunction with each other, as supplementing each other and as subject to the scope of the Act insofar as it provides for business rescue proceedings. They disagreed with the holding by the Court of Appeal that business rescue proceedings begin at the point where the provisions of section 43 kick-in and the business rescue plan is adopted by affected persons and therefore, section 25(1) did not apply to the application.

37) Reverting to their arguments on statutory interpretation, counsel drew our attention to our decisions in the cases of ***Mazoka and others v Mwanawasa and others***[1] and ***Matilda Mutale v Emmanuel Munaile***[2] which set out the principles of statutory interpretation. They concluded by reiterating the intention of Parliament when enacting the Act.

38) In the *viva voce* arguments Mr. Madaika once again attacked the holding by the Court of Appeal that business

rescue proceedings only commence after the provisions set out in section 43(1) have been concluded. Here, counsel argued that the holding was in conflict with section 21 of the Act which stipulates that business rescue proceedings begin after the members pass a special resolution to place a company under business rescue proceedings. Counsel also took issue with the decision by the Court of Appeal upholding the learned High Court Judge that an application launched under section 22(1) of the Act is not a legal proceeding against a company. He argued that the action commenced by the Respondent in the High Court was clearly an action against the Appellant as a company and was specific as to the relief sought. It was, therefore, a legal proceeding in accordance with section 25(1) of the Act. We were urged to allow the appeal.

39) In the Respondent's head of argument, counsel dealt with grounds 1 and 2 of the appeal together. They argued that sections 22(1) and 25(1) of the Act are standalone provisions. As such, an applicant commencing an action

under section 22(1) does not require to invoke the provisions of section 25(1).

40) Counsel advanced their arguments by urging us to adopt the literal rule of interpretation in construing the meaning of sections 22(1) and 25(1). They argued that the High Court Judge and Court of Appeal were on firm ground when they applied the literal rule of interpretation in arriving at the decision that there is no interplay between the two sections because there is no ambiguity in them calling for the application of other rules of interpretation. To this end, counsel quoted passages from the decisions of this court in the cases of ***Mazoka and others v Mwanawasa and others[1], Matilda Mutale v Emmanuel Munaile[4]*** and ***Attorney-General and another v Lewanika and others[5].***

41) In addition, counsel contended that the window for an affected party to make the application under section 22(1) is open from the point when a company passes the resolution to go into business rescue proceedings up to the adoption of a business rescue plan in accordance with

section 43. This, and the limitation set out in section 21, are the only ones that an affected person encounters. Counsel invited us to consider an article by Chanda Chungu in ***SAIPAR Case Review***, on the decision of the Court of Appeal in this matter in which the author concludes that business rescue proceedings commence at the point where a company adopts and subsequently files the resolution to go into business rescue proceedings. Further, the law gives an affected person up to the point where the business rescue plan has been adopted to challenge the adoption of the resolution. They concluded that the period in which an affected person has a right to commence a section 22(1) application is not subject to the moratorium under section 25(1) of the Act.

42) In justifying the conclusion set out in the preceding paragraph, counsel argued that the *"legal proceedings"* referred to in section 25(1) of the Act do not apply to all legal proceedings that are launched under the Act. Consequently, the application under section 22(1) is not a *"legal proceeding"* in the context of section 25(1). Here,

counsel quoted at great length a passage from the English case of ***Thomas Cook***[3]. They argued that the ***Thomas Cook***[3] case discussed various cases such as the ***Eastern Holdings Establishment of Veduz v Singer and Friedlander Limited***[6] where an interpleader summons was held to infringe the statutory moratorium because the relief sought would have resulted in an adverse order being made against the company under administration.

43) On the other hand, in the ***Humber and Co. v John Griffins Cycle Co.***[7] case, it was held that an application for security for costs against a company in liquidation and subsequent appeal do not fall within the restrictions of the statutory moratorium. Counsel concluded that the last two cases show that the approach taken by the courts is to look at whether the action is commenced against a company in administration with a claim for a relief that would put the finances and effective administration of the company in jeopardy.

44) Counsel went on to agree with the holding by the Court of Appeal that the proceedings by the Respondent in the High

Court were not *"legal proceedings"* as envisaged by section 25(1) of the Act because there was no demand or relief sought against the Appellant. It was argued that by its holding, the Court of Appeal acknowledged that the moratorium does not apply to all legal proceedings but applies only to those actions contemplated under section 25(1) of the Act which would result in a company under business rescue suffering some loss.

45) Counsel advanced their arguments by contending that the claim which was before the High Court was for the determination of whether or not the Appellant should be in business rescue. This, counsel argued, is not a legal proceeding against the company or its property as envisaged under section 2(3) of the Act which defines *"business rescue proceedings"* and the intention to protect the company and its property from harm.

46) Counsel concluded arguments under these two grounds of appeal by referring to the South African case of ***David Jacque Richter v ABSA Bank Limited***[8] in which our counterpart court set out the rationale for introduction of

business rescue proceedings in its legislation. They argued that in the strict sense, where a company has complied with the provisions of section 21 and an action is brought against a company, the moratorium under section 25(1) applies. It does not, however, apply in respect of an action taken out under section 22(1) which questions whether the procedure set out in section 21 has been followed.

47) Coming to ground 3 of the appeal, the simple argument advanced by counsel was that the fact, in and of itself, that two sections are in the same part of an Act does not mean that they are interrelated or should be interpreted together. Counsel contended that each section in an Act must be interpreted in the manner it has been crafted as being valid in itself and can be construed separately and/or with other provisions of the Act.

48) The summary of the collective *viva voce* arguments by Mrs. K. Tembo, Mrs. H. Musa, Mrs. T. Banda – Chasaya and Mr. Katungu in respect of all three grounds of appeal were as follows:

48.1 There is no interplay between sections 22(1) and 25(1). This is revealed by applying the literal rule of interpretation;

48.2 The moratorium under section 25(1) is selective and not applicable in all actions against a company undergoing business rescue proceedings. This is in accordance with the holding by the Court of Appeal of England and Wales in the ***Thomas Cook***[3] case;

48.3 Not all legal proceedings launched against a company under business rescue proceedings qualify as being legal proceedings as envisaged under section 25(1).

49) We were urged to dismiss the appeal.

Consideration and decision by this Court

50) In our determination of this appeal, we have considered the record of appeal and arguments by counsel, both written and *viva voce*. The first issue that the three grounds of appeal raise is whether or not there is interplay between sections 22(1) and 25(1) of the Act. In other words, is the procedure prescribed under section 25(1) for

launching an action against a company undergoing business rescue proceedings applicable to an action brought to court pursuant to section 22(1)? At the expense of repetition; should the Respondent have sought the consent of the business rescue administrator or leave of court before commencing the action in the High Court? This issue arises from the holding by the Court of Appeal that business rescue proceedings only commence after the business rescue plan has been adopted by the affected parties in terms of section 43 of the Act. Consequently, the moratorium is not applicable during this window.

51) The other issue is, whether or not the proceedings which were before the learned High Court Judge were *"legal proceedings"* as defined by section 25(1) of the Act. This arises from the holding by the Court of Appeal which was in agreement with the learned High Court Judge that there was no demand or relief sought against the Appellant as a company in the action before the High Court, therefore, it was not a legal proceeding pursuant to section 25(1) but

rather an action questioning the decision making process by the Appellant to go into business rescue proceedings.

52) The approach we will take in dealing with these issues is to determine the type or types of proceedings which are envisaged under the two sections. These two sections state as follows:

52.1 *"22. (1) Subject to subsection (2), at any time after the adoption of a resolution as specified in section 21 and until the adoption of a business rescue plan in accordance with section with section 43, an affected person may apply to a Court for an order –*

(a) Setting aside the resolution on the grounds that –

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirements set out in section 21;

(b) Setting aside the appointment of the business rescue administrator, on the grounds that the business rescue administrator –

(i) is not qualified as provided in section 30;

(ii) is not independent of the company or its management; or

(iii) lacks the necessary skills, having regard to the company's circumstances; or

(c) Requiring the business rescue administrator to provide security in an amount and on terms and conditions that the Court considers necessary, to secure the interest of the company and any affected person."

52.2 *"25. (1) 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 –*

(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, irrespectively of whether those proceedings commenced before or after the business rescue proceedings began;

(d) criminal proceedings against any of the company's directors or officers; or

(e) 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 other person may not be enforced by any person against the company during business rescue proceedings, except with leave of the 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 that time shall be suspended during business rescue proceedings.

53) We will begin by looking at section 25. The rationale for the moratorium under section 25(1) is to prevent interested persons or creditors launching an assault on the assets of a company in financial distress. The Court of Appeal of England and Wales stated this rationale aptly in the ***Thomas Cook***[3] case when it held that the moratorium on legal proceedings contained in paragraph 43(6) of schedule B1 to the ***Insolvency Act***, 1986 (which mirrors

provisions of our section 25) was to assist in the achievement of the purpose of an administration by preventing dismemberment of assets of a company through execution or distress and by preventing the company being distracted by unnecessary claims.

54) Therefore, the proceedings envisaged under section 25(1) which require the consent of the business rescue administrator or permission of the court prior to commencement, are actions for the recovery of money owed by the company to a creditor, the levying of execution against the assets of the company or any action which may result in depletion of the assets of the company, to give but a few examples.

55) The idea is to preserve or protect the assets of a company undergoing business rescue proceedings in anticipation of the meeting of all stakeholders (affected persons), convened by the business rescue administrator, pursuant to section 43, for purposes of laying before the affected persons, the plan to rescue the company out of distress for their approval. This meeting would be rendered academic

if the assets of the company were allowed to be assaulted or dismembered.

56) On the other hand, the proceedings envisaged under section 22(1) are those that give an affected person or creditor the opportunity to question the genuineness or otherwise of the resolution by the members of the company to place it under business rescue proceedings and check if the appointed business rescue administrator has the requisite qualifications. These indeed, were the questions which were posed in the application before the learned High Court Judge. It did not involve decisions on the assets of the company.

57) The legal action was preceded by a letter from the Respondent's advocates to the business rescue administrator requesting him to clarify the discrepancy in the dates when the resolution was passed placing the Appellant under business rescue proceedings and provide proof of his registration with PACRA as a business rescue practitioner. The letter also requested the business rescue administrator to justify the action taken by the members

of the Appellant, of placing the Appellant under business rescue proceedings. These are same questions the Respondents sought to be addressed by the action in the High Court which did not in any way threaten the assets of the Appellant. For this reason, we are of the firm view that there is no interplay between sections 22(1) and 25(1) of the Act. Our decision is reinforced by the fact that neither section stipulates that it is subject to the other.

58) Consequently, in launching the proceedings under the provisions of section 22(1) a party is not required to seek consent of the business rescue administrator or leave of the court. It would indeed be an absurdity to require an affected person to seek the consent of a person whose appointment he is challenging to commence proceedings against him. In the case with which we are engaged, one of the issues before the learned High Court Judge was a determination of whether or not the appointed business rescue administrator was registered as an insolvency practitioner with PACRA.

59) The question we have posed is, does it not defy logic to require the Respondent to seek the consent of the business rescue administrator to launch a suit against him? We think it does, especially that the members are left at large by the Act to resolve at any time to place the company into business rescue proceedings and appoint a business rescue administrator. The same liberty must be extended to a person challenging the resolution and appointment. We are vindicated in our decisions that the need for consent would defy logic by the inaction of the business rescue administrator following receipt of the letter we have referred in paragraph 57 from the Respondent's counsel. He remained mute. What was the Respondent to do other than invoke a section 22 application? The moratorium, is, therefore, not a blanket protection afforded to a company against all suits but only those that affect its assets.

60) To this extent, we uphold the decision of the Court of Appeal although we do not agree with the road map leading up to its decision. In arriving at its decision, the Court held that business rescue proceedings only

commence after the adoption of the business rescue plan in term of section 43 of the Act and that an application under section 22(1) is aimed at preventing a company from going into business rescue proceedings. As Mr. Madaika quite rightly argued, business rescue proceedings begin at the point where the members of a company pass a resolution to that effect and file it with PACRA or following an order of the Court to that effect in terms of section 23. This is reinforced by the provisions of section 21(1) which empower members of a company to pass a resolution to that effect and is aptly titled *"Resolution to begin business rescue proceeding"*.

61) We would also like to point out that we considered the case of ***Thomas Cook***[3] referred to by counsel for both parties and the other English cases it discusses and only found its relevance to be the extent it explains the rationale for the moratorium on legal proceedings. The *ratio decidendi* in that and other English cases it refers to is that the moratorium on legal proceedings only applies to proceedings launched against a company in

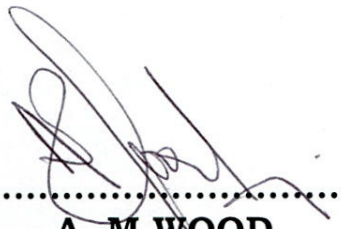
administration. It does not apply to actions taken out by a company which later goes into administration. The rationale here being that basic fairness requires that a defendant to proceeding where the claimant was a company in administration should be able to defend itself without restriction.

62) The ***Thomas Cook***[3] case also discussed the effect of an appeal against a company in administration and held that if an appeal is against the dismissal of an action against a company in administration, the moratorium applies. The converse is also applicable that if the original application was not a proceeding against the company in administration, an appeal against the dismissal of such application would not be considered as a proceeding to which the moratorium applied.

Conclusion

63) The result of our holding is that the appeal must fail and we uphold the decision of the Court of Appeal to the extent we have stated in the preceding paragraphs. We

accordingly dismiss it with costs, to be taxed in default of agreement. The recoverable costs by the Respondent will be restricted to those incurred in respect of two advocates. Though this appeal raises novel issues, we are of the firm view that it did not justify the Respondent retaining five advocates.



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A. M WOOD
SUPREME COURT JUDGE

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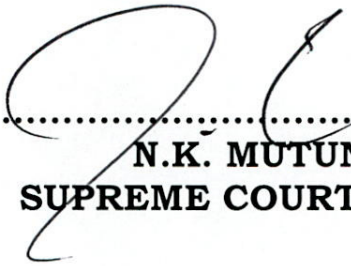
C. KAJIMANGA
SUPREME COURT JUDGE



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N.K. MUTUNA
SUPREME COURT JUDGE