

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

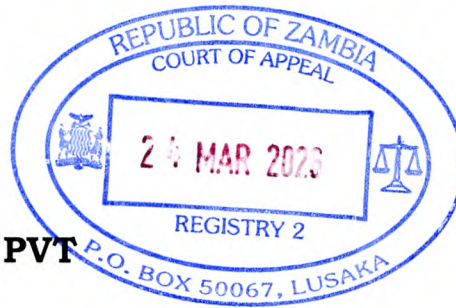
APPEAL NO. 203/2023
CAZ/8/242/2023

BETWEEN:

DETON ENGINEERING PVT

AND

KONKOLA COPPER MINES PLC



APPELLANT

RESPONDENT

CORAM: CHASHI, NGULUBE AND BANDA-BOBO, JJA.
On 18th February, 2026 and 24th March 2026

For the Appellant: Mr. J. Mazumba – Messrs. Douglas & Partners

For the Respondent: Ms. S. Banda & Mrs. M Njobvu – Messrs. ECB
Legal Practitioners

R U L I N G

NGULUBE, JA delivered the Ruling of the Court.

Cases referred to:

1. *ZCCM Investment Holdings Plc vs Muyangwa Mufalali & 141 Others – Selected Judgment No. 14 of 2017*
2. *Creditors of Maamba Collieries Limited vs Mamba Collieries Limited – SCZ Appeal No. 48/2017*

3. *African Wide Mineral Prospecting and Exploration (PTY) Ltd vs Platinum Group Metals (RSA) (PTY) Ltd & Others – Case No. 31329/2018*
4. *Re T & N Limited & Others [2006] EWHC 1447 (Ch)*
5. *Re Midland Coal, Coke & Iron Company [1895] 1Ch 267*
6. *SAAG Oilfield Engineering Limited (Formerly known as Derrick Services Singapore Pte Limited) vs Shaik Abu Baker Bin Abdul Sukol & Another – Appeal [2012/SGCA/71]*

Legislation referred to:

1. *The Court of Appeal Rules, Statutory Instrument No. 65 of 2016.*
2. *The Corporate Insolvency Act No. 9 of 2017.*

1.0 INTRODUCTION

- 1.1 This is a ruling on the respondent's motion to raise a preliminary issue on a point of law. It is made pursuant to Section 46(8)(a) of the **Corporate Insolvency Act, No. 9 of 2017 and Order XIII Rule 2(3) of the Court of Appeal Rules.**¹
- 1.2 The basis of the preliminary issue is that this Court has no jurisdiction to entertain this appeal when there is an approved Scheme of Arrangement binding all creditors of the respondent.

2.0 THE RESPONDENT'S AVERMENTS

- 2.1 The application was accompanied by an affidavit and Skeleton Arguments. The affidavit was deposed to by Mukuka Mukuka,

Counsel seized with conduct of the matter on behalf of the respondent.

2.2 He deposed that on 7th August 2013, the appellant commenced an action in the Court below, seeking amongst other reliefs, specific performance and payment of the sum of K368,074.00 and storage charges. That the lower Court rendered its Judgment on 28th September, 2020 and the matter proceeded to assessment.

2.3 It was deposed that on 21st May 2019, ZCCM Investment Holdings petitioned the High Court for the respondent to be wound up. That following an order of the Court, the respondent advertised in the Zambia Daily Mail between 8th April and 10th April, 2024, calling for a meeting for the respondent's Scheme Creditors Meetings.

2.4 It was deposed that following this notice, the respondent held meetings for all Scheme Creditors for Class 1 on 24th May 2024 and Class 2 creditors on 30th May, 2024.

2.5 The deponent averred that following these meetings, the deliberations were considered by the Court below on 13th June, 2024 and the Court approved the Scheme of Arrangement

under Cause Number 2019/HP/0761 on 28th June, 2024. That the Ruling of the Court and the Scheme of Arrangement was binding on all creditors in class 1 (those with claims of less than US\$1,000,000.00) and class 2 creditors (those with claims exceeding US\$1,000,000.00).

2.6 He averred that the term “*Claim*” was broadly defined in the explanatory statement of the Scheme of Arrangement to include a cause of action and potential claim. That therefore, the appellant’s claim for breach of contract was encompassed in this definition.

2.7 It was deposed further that by Ruling of the High Court, the learned Judge ordered that claims not filed with the Scheme Administrator before the bar date being 15th August 2024, shall be forfeited. That the Scheme of Arrangement is binding on all scheme creditors including the appellant who ought to have directed its claim to the Scheme Administrator for assessment, reconciliation and processing of the payment by the respondent.

2.8 Further that the appellant has not filed any claim under the scheme and therefore the attempt to seek relief from the Court is improper. That this is because this Court has no jurisdiction

to entertain the appellant's claim since the appropriate forum to do so is the Schemes Administrator who would have adjudicated upon the disputed amounts within the framework of the scheme.

- 2.9 In the Skeleton Arguments in support of the motion, the respondent's Counsel submitted that this Court has no jurisdiction to entertain this appeal as this is the wrong forum and the matter is procedurally improper. Counsel found solace in the case of **ZCCM Investment Holdings Plc vs Muyangwa Mufalali & 141 Others**¹ where it was held that the legal position that an issue not raised at trial cannot be raised for the first time on appeal does not apply to a question of jurisdiction.
- 2.10 In relying on **Section 46(8) of the Corporate Insolvency Act No. 9 of 2017**, it was argued that once a scheme of arrangement is sanctioned by the Court, it is binding on all creditors of the company whether they actively participated in the process or not. To buttress this argument, Counsel made reference to the case of **Creditors of Maamba Collieries Limited vs Mamba Collieries Limited**² where the Supreme Court considered the effect of **Section 234(6) of the repealed**

Companies Act, Chapter 388 of the Laws of Zambia, which is similar to **Section 46(8) of the Corporate Insolvency Act No. 9 of 2017**. The gist of this decision is that a scheme of arrangement is binding on all creditors once approved by the Court and a copy of the Court order lodged with the Registrar. Further this being a statutory provision, it prevailed over the Consent Order.

2.11 It was submitted by Counsel that the definition of “*Creditor*” in **Section 2 of the Corporate Insolvency Act** includes a person entitled to enforce a final judgment or court order. That further the appellant qualified to be a creditor under the Act and under the respondent’s scheme.

2.12 It was submitted further that having failed to lodge its claim with the Scheme Administrator before the bar date, the appellant forfeited its claim by operation of the law. Further that the appellant cannot claim insufficient notice of the proceedings sanctioning the scheme because there was an advertisement in the newspaper and therefore the notice was properly served as per **Section 47(4) of the Corporate Insolvency Act**. To support this argument further, Counsel

found comfort in the Supreme Court's decision in the case of ***Creditors of Maamba Collieries Limited vs Maamba Collieries Limited (supra)***.

2.13 Learned Counsel has also invoked the persuasive authority of foreign jurisdictions, specifically citing the cases of ***African Wide Mineral Prospecting and Exploration (PTY) Ltd vs Platinum Group Metals (RSA) (PTY) Ltd & Others***,³ ***Re T & N Ltd & Others***,⁴ ***Re Midland Coal, Coke & Iron Company***⁵ and ***SAAG Oilfield Engineering Limited (Formerly known as Derrick Services Singapore PTE Limited) vs Shaik Abu Baker Bin Abdul Sukol & Another***⁶ to support their submissions.

3.0 THE APPELLANTS' ARGUMENTS

3.1 The appellant filed an affidavit in opposition deposed to by James Mazumba, Counsel seized with conduct of the matter on behalf of the appellant.

3.2 He averred that this Court has the requisite jurisdiction to entertain the appeal because the appellant did not qualify as a creditor within the contemplation of the scheme of

arrangement, the definition of which is expressly provided for in the ***Corporate Insolvency Act.***

- 3.3 It was deposed that the appeal was lodged before the scheme of arrangement and therefore the appeal cannot be termed as debt until it has been heard by this Court. That in any event, the respondent has always denied liability and continued denying it even after Judgment on assessment.
- 3.4 The deponent verily believes that the scheme of arrangement does not require that all matters pending in Court against the company be terminated but is only an arrangement as to how the creditors will be paid.
- 3.5 Further that both the matter in the lower and the present appeal were lodged years before the scheme of arrangement came into force. Furthermore, that there is no final Judgment of this Court to ascertain the amount payable to the appellant.
- 3.6 In the Skeleton arguments in support of the affidavit in opposition, Counsel for the appellant submitted that the motion should be dismissed because it was not brought within the requisite period of fourteen (14) days as per requirement under ***Order XIII Rule 5 of the Court of Appeal Rules.***

- 3.7 Counsel submitted further that the issue raised by the respondent is not one of jurisdiction as the appeal was lodged before the scheme of arrangement was approved.
- 3.8 It was submitted that the central issue which this Court should determine is whether the appellant is a creditor who was supposed to make a claim under the respondent's scheme of arrangement.
- 3.9 It was argued by Counsel that the definition of a creditor in **Section 2 of the Corporate Insolvency Act** includes a person who is entitled to enforce a final judgment or order of Court. He argued that this definition excludes pending litigation where no final judgment has been entered. Counsel found solace in the Latin maxim "*expression unius est exclusion alterius*" which means that the expression of one thing is the exclusion of another. This is a principle of interpretation in law which means that when a document or statute explicitly mentions specific things, it implies the exclusion of other things not mentioned. The gist of Counsel's argument was that the inclusion of final judgment or order of the court in the definition, excludes pending litigation.

3.10 Counsel argued that looking at **Section 46 of the Corporate Insolvency Act**, a scheme of arrangement is entered into and is binding where 75% of the creditors consent to the proposed restructuring. That therefore, it is “*sui generis*” and specifically meant to allow creditors to meet and consider a compromise. It is not meant to be a forum for litigation of the company’s potential liability in pending law suits where there is no final judgment. It was Counsel’s argument that at the time the scheme of arrangement came into effect, there was no debt that was owing.

3.11 It was Counsel’s argument that the definition of creditor in the scheme of arrangement is ultra vires **Section 2 of the Corporate Insolvency Act**, as its definition is broader including a cause of action, potential claims and future claims, which are not envisaged by the Act. He argued that the respondent’s explanatory statement made in accordance with **Section 47 of the Corporate Insolvency Act**, is a proposed compromise informing creditors of how they will be affected by the scheme so that they can make an informed decision.

4.0 THE HEARING OF THE MOTION

4.1 At the hearing of the motion, both parties relied on their written arguments filed into court, augmenting these with oral submissions that largely reiterated their written positions. In the interests of brevity and judicial resources, we shall not reiterate these arguments here.

5.0 CONSIDERATION AND DECISION

5.1 We have considered the motion, the affidavits and the parties' respective arguments. The primary issue for determination is whether this Court has jurisdiction to entertain this appeal when there is an approved Scheme of Arrangement binding all creditors of the respondent.

5.2 Before we delve into the substantive merits of the motion, it is incumbent upon us to first address the procedural issue raised by the appellant concerning the competency of the motion. The appellant contends that the issues raised in the motion ought to have been raised within a period of fourteen (14) days as per requirement in ***Order XIII Rule 5 of the Court of Appeal Rules***. The respondent contends that the issue raised touches

on jurisdiction which can be raised for the first time even on appeal.

5.3 We have given due consideration to the preliminary objection on competency. **Order XIII Rule 5 of the Court of Appeal Rules** prescribes the period within which certain preliminary objections ought to be raised. However, it is trite that where an issue goes to jurisdiction, such an issue may be raised at any stage of the proceedings, even for the first time on appeal. Jurisdiction is foundational and without it, a Court must down its tools.

5.4 The respondent's motion challenges this Court's authority to entertain the appeal on account of an approved Scheme of Arrangement. That contention, by its very nature, questions the competence of the proceedings before us. We therefore find that the motion properly raises an issue of jurisdiction. Consequently, the objection premised on non-compliance with **Order XIII Rule 5** cannot defeat a challenge that strikes at the root of the Court's mandate. The procedural objection is accordingly dismissed.

- 5.5 We now turn to the substantive issue: whether where a compromise or arrangement is sanctioned by the Court, it shall be binding on the company and on all creditors, or the relevant class of creditors, as the case may be. The effect of such sanction is therefore statutory and not merely consensual. This position was authoritatively considered in ***Creditors of Maamba Collieries Limited vs Maamba Collieries Limited (supra)***, where the Supreme Court held, in construing a provision similar to **Section 46(8)** that once sanctioned and duly lodged, a scheme of arrangement binds all creditors within the affected class, irrespective of individual assent.
- 5.6 The binding nature of a scheme, however, does not in itself resolve the question before us. The anterior inquiry is whether the appellant falls within the category of ‘*creditor*’ contemplated by the Act and by the sanctioned scheme. If the appellant is not a creditor within that meaning, then the statutory bar cannot operate to oust this Court’s jurisdiction.
- 5.7 **Section 2 of the Corporate Insolvency Act** defines a “*creditor*” to include a person entitled to enforce a final judgment or Court order. The respondent urges a broad interpretation, contending

that the explanatory statement to the scheme extended the definition of “*claim*” to include causes of action and potential claims, and that this encompasses the appellant’s pending appeal. The appellant, on the other hand, argues that the statutory definition contemplates enforceable obligations, not disputed or unascertained claims pending adjudication.

5.8 It is a cardinal principle of statutory interpretation that where the legislature has defined a term, that definition governs. A Scheme of Arrangement, though sanctioned by the Court, derives its legitimacy from statute. It cannot extend its reach beyond what the enabling Act permits. While **Section 46(8)** renders an approved scheme binding, it does so in respect to those persons who properly fall within the statutory description of creditors.

5.9 In the present matter, it is common cause that the matter in the Court below and this appeal were lodged years prior to the approval of the scheme. It is equally not disputed that there is, as yet, no final judgment of this Court determining the quantum of liability, if any, due to the appellant. The matter remains *sub judice*. The respondent has consistently disputed liability. In

those circumstances, the appellant's claim remains contingent and unascertained.

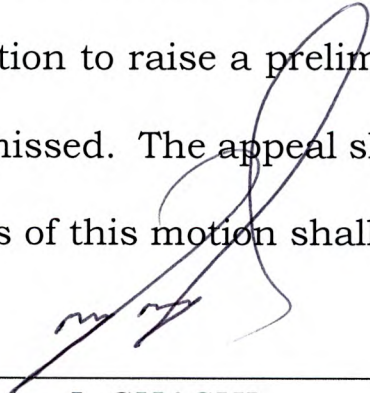
5.10 We are not persuaded that the statutory definition of "*creditor*" in **Section 2**, by expressly including a person entitled to enforce a final judgment or order, was intended to encompass parties engaged in pending litigation where liability has not been conclusively determined. To hold otherwise would effectively convert every litigant with a pending claim before the court into a creditor for purposes of a scheme of arrangement, irrespective of whether the claim is established. Such an interpretation would risk collapsing the distinction between a proven debt and a disputed cause of action.

5.11 Furthermore, we concur with Counsel for the appellant that the function of a scheme under **Section 46** is to facilitate a compromise or restructuring between a company and its creditors. It is not, in our considered view, designed to serve as a forum for determination of contested liability in ongoing court proceedings. The adjudicative function remains vested in the courts.

5.12 We therefore find that at the time the scheme was sanctioned, the appellant did not possess an enforceable judgment or ascertained debt against the respondent. The appellant's status as a creditor, if any, remains contingent upon the outcome of this appeal. It follows that the appellant was not a creditor within the contemplation of **Section 2** of the Act for purposes of being bound to lodge a claim under the scheme in respect of the subject matter of this appeal.

5.13 In light of the foregoing, we hold that the sanctioned Scheme of Arrangement does not operate to oust the jurisdiction of this Court to determine the present appeal. The respondent's contention that this Court lacks jurisdiction is without merit.


5.14 Accordingly, the motion to raise a preliminary issue on a point of law is hereby dismissed. The appeal shall proceed to hearing on the merits. Costs of this motion shall be in the cause.



J. CHASHI
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE



A. M. BANDA-BOBO
COURT OF APPEAL JUDGE