

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



2023/HP/0169

IN THE MATTER OF: THE CORPORATE INSOLVENCY ACT NO 9 OF 2017

AND

IN THE MATTER OF: IN THE MATTER OF SECTIONS 21, 22 (1) (b),
32, 33, 36, 41 & 43 OF THE CORPORATE
INSOLVENCY ACT NO 9 OF 2017

AND

IN THE MATTER OF: LUSAKA HOTELS LIMITED MARCUS K.
ACHIUME (Sued as Business Rescue
Administrator)

BETWEEN:

MILDRED SAKALA

PLAINTIFF

AND

LUSAKA HOTELS LIMITED
MARCUS K. ACHIUME

1st DEFENDANT
2nd DEFENDANT

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS DAY OF DECEMBER,
2023

For the Plaintiff : Dr. Henry Mbushi, Messrs HBM Advocates
For the Defendants : Mr. B Ngalasa, Messrs NCO Advocates

J U D G M E N T

CASES REFERRED TO:

1. *Townap Textiles Zambia Limited and Chhaganlal Distributors Limited v Tata Zambia* 1988-1999 ZR 93
2. *Re Colt Telecom Group Plc* (2002) EWHC
3. *Anderson Kambela Mazoka, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, the Electoral Commission of Zambia and the Attorney General* 2005 ZR 138
4. *Kunda v Konkola Copper Mines Plc* App No 48 of 2005

5. *Swart v Beagle Run Investments 25 (Pty) Limited & others 2011 (5) SA 422 (GNP)*
6. *Antonio Welman v Marcelle Props 193 cc and others Case No 33958/2011 (SCP)*
7. *HMRC v Rockell Drinks Distributors Limited 2012 1 BCLC 748*
8. *Southern Place Investments 265 (Pty) Limited v Midnight Storms Investment 2012 (2) SA 423 (WCC)*
9. *BNY Corporate Trustee Services Limited v Eurosail 2013 UKSC 28*
10. *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & others 2015 ZA SCA 69*
11. *First National Bank Zambia Limited, First Rand Bank Limited v Metalco Industries Company Limited, Central Recycling Company Limited & Felix Chisambo 2019/HP/358*
12. *Post Newspapers Limited (in Liquidation) v Abel Mbozi and others Appeal No 7 of 2021*
13. *Chimanga Changa Limited v Export Trading Limited Appeal No CAZ 053/2021*
14. *House of Jasmine Limited v Dukon Paints (1998) Limited Appeal No 037/2021*
15. *Chimanga Changa Limited v Export Trading Limited Appeal No 3 of 2022*

LEGISLATION REFERRED TO:

1. *The Corporate Insolvency Act No 9 of 2017*

OTHER WORKS REFERRED TO:

1. *Halsbury's Laws of England, Volume 7 (3), 4th Edition*

1. INTRODUCTION

1.1 The Plaintiff herein, Mildred Sakala seeking to stop measures aimed at resuscitating of the 1st Defendant, Lusaka Hotels Limited, her former employer, as provided under the **Corporate Insolvency Act No 9 of 2017** commenced proceedings by way of Originating Summons which is accompanied by an affidavit and a List of Authorities and Skeleton Arguments on 2nd February, 2023 claiming:

- i. *An Order to set aside the business rescue proceedings that were instituted by Lusaka Hotels Limited.*
- ii. *An Order to set aside the appointment of Marcus K. Achiume as Business Rescue Administrator.*
- iii. *An Order for the interpretation of Sections 21, 22 (1) (b), 25, 32, 33, 36, 39, 41, 42 & 43 of the Corporate Insolvency Act No 9 of 2017.*
- iv. *An Order to appoint a Liquidator pursuant to Section 24 (2) (ii).*
- v. *That Lusaka Hotels Limited and Marcus K. Achiume produce the documents contained in the demand letters.*
- vi. *Further or other relief as the Court deem fit.*
- vii. *Interest.*
- viii. *Costs of and incidental to the matter.*

2. AFFIDAVIT IN SUPPORT

2.1 The affiant of the affidavit, Mildred Sakala, in deposing, states that she was an employee of Lusaka Hotels Limited from 7th January, 2003 until 11th August, 2018, when she was declared redundant. She avers that the sum of One Hundred and Forty-Seven Two Hundred and Fifty-Three Kwacha and Ninety-Three Ngwee (K147, 253.93) was due to her as terminal benefits, as evidenced by the computation which was done by Lusaka Hotels Limited, and is exhibited as 'MS1'. However, since having left her employment, she has only been paid the amount of Two Thousand Kwacha (K2,000.00), leaving a balance of One Hundred and Forty-

Five Thousand Two Hundred and Fifty-Three Kwacha and Ninety-Three Ngwee (K145, 253.93).

- 2.2 It is further Mildred Sakala's averment that efforts to have the balance paid have proved futile, and this is despite her having engaged advocates who wrote the demand letter that is exhibited as 'MS2' to Lusaka Hotels Limited. Also deposed, is that her advocates commenced proceedings against Lusaka Hotels Limited by Writ of Summons on 9th February, 2022, which was amended on 18th July, 2022. The said Writs of Summons are exhibited as 'MS3' and 'MS4'.
- 2.3 Then as shown on exhibit 'MS5', Lusaka Hotels Limited tried to challenge the Writ. However, by an Order dated 12th July, 2022, the High Court, as evidenced by exhibit 'MS6' ordered Lusaka Hotels Limited to pay Mildred Sakala her terminal benefits with interest. Then on 16th December, 2022, Lusaka Hotels Limited in a letter that is exhibited as 'MS7' enclosed a Statutory Notice of Business Rescue, which is exhibited as 'MS8'.
- 2.4 It is also stated that Marcus. K. Achiume by the letter exhibited as 'MS9', and is dated 20th December, 2022 introduced himself as Business Rescue Administrator. Mildred Sakala states that in the said letter, Marcus K. Achiume requested to meet her advocates on 27th December, 2022, to discuss how payment of the monies due to her would be done.
- 2.5 However, on her advocates attending the said meeting, they were advised that they would meet the Managing Director

David Thompson on a date to be arranged. Still in averment, Mildred Sakala deposes that she was telephoned on 31st December, 2022, and was informed to arrange a meeting with David Thompson which she communicated with her lawyer. She states that the agreed date for the meeting was set for 3rd January, 2023 at 11:00 hours.

- 2.6 Further in averment, Mildred Sakala states that on 3rd January, 2023, a meeting was held in David Thompson's office on the 2nd floor at Church House, and in attendance were David Thompson, Mildred Sakala and her lawyer, Dr Henry Mbushi SC. Mildred Sakala deposes that David Thompson proposed that she enters into an agreement on how Lusaka Hotels Limited would settle her terminal benefits.
- 2.7 She states that her lawyer objected to the proposal, as the matter was with the Business Rescue Administrator and Lusaka Hotels Limited had no power to deal with her Judgment debt. It is also her averment, that David Thompson attributed the delay to pay the Judgment debt to the delay by Infinity Group of Companies who had defaulted for Seven (7) months to pay the purchase price for Lusaka Hotels Limited, that it had purchased.
- 2.8 Then thereafter, demand letters to pay were sent to Lusaka Hotels Limited and Marcus K. Achiume, which are exhibited as 'MS10' and 'MS11'. It is stated that Marcus K Achiume, by the letter exhibited as 'MS12' responded to the letter.

- 2.9 The contention is that Marcus K. Achiume has breached the law on how to deal with the work of a Business Rescue Administrator, and is incompetent, and he should be discharged from his appointment as Business Rescue Administrator. It is also stated that there is no possibility that Lusaka Hotels Limited can be rescued from its' indebtedness.
- 2.10 The assertion is further that Lusaka Hotels Limited is incapable of paying the debt that it owes Mildred Sakala, and it should be placed under liquidation, with a Liquidator being appointed by the Court.

3. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN SUPPORT

- 3.1 Mildred Sakala in the List of Authorities and Skeleton Arguments, gives a background to the matter, stating that after Judgment was obtained in her favour and a Writ of Fieri Facias was issued to levy execution, the Bailiffs discovered that the property belonging to Lusaka Hotels Limited had been sold to Infinity Group of Companies. She also states that David Thompson in the meeting that was held on 31st December, 2022, confirmed that Lusaka Hotels Limited had been sold to Infinity Group of Companies.
- 3.2 The argument is further that Business Rescue proceedings are governed by **Section 21 of the Corporate Insolvency Act No 9 of 2017**. That under that provision of the law, a special resolution is made based on the fact that:
- a) The company is financially distressed; and

b) There appears to be reasonable prospects of rescuing the company from financial distress.

3.3 It is also argued that there are Two (2) routes by which business rescue proceedings may be instituted, which are:

- i. By special resolution of the board of directors of a company to begin the business rescue proceedings voluntarily, where the Board has reasonable grounds to believe that the company is in financial distress, and there appears to be reasonable prospects or rescuing the company; and
- ii. By application to the Court, by an affected person at any time for an Order placing the Company under supervision and commencing the business rescue proceedings.

3.4 The contention is that as seen on exhibit 'MS8', Lusaka Hotels Limited chose the first route. However, Mildred Sakala contends that Lusaka Hotels Limited did not comply with the requirements of the law as contained in **Section 21 (3) (a) (4) (b) & 7 of the Corporate Insolvency Act No 9 of 2017**, as a copy of the special resolution to commence the business rescue proceedings was not availed to her.

3.5 The decision of the Court of Appeal, in the case of **Chimanga Changa Limited v Export Trading Limited** ⁽¹³⁾ is cited, stating that in that matter, the Court of Appeal held that a person who is affected, has power to raise the issue of jurisdiction of the Court, and to apply to set aside the

business rescue proceedings on the basis that they were not served.

- 3.6 The case of ***First National Bank Zambia Limited, First Rand Bank Limited v Metalco Industries Company Limited, Central Recycling Company Limited & Felix Chisambo*** ⁽¹¹⁾ is also cited as authority. It is argued that in that case, proceedings were commenced to set aside the resolution to place Metalco Industries Company Limited, Zalco Limited and Central Recycling Co Limited in business rescue, on the grounds that there were no reasonable prospects of rescuing the said companies, and that it was just and equitable to do so.
- 3.7 That further in that matter, the appointment of Felix Chisambo as Business Rescue Administrator was sought to be set aside on the grounds that he had failed to exercise a proper degree of care in the performance of his functions. It is stated that the Court in that matter, set aside the resolution to place the companies under business rescue, as there were no reasonable prospects of the companies being rescued from their financial distress.
- 3.8 Further, the appointment of the Business Rescue Administrator was set aside on the basis of failure to possess the necessary skills, and for failure to exercise a proper degree of care in the performance of his duties.
- 3.9 The argument is that in this matter, in the meeting of 31st December, 2022, it was confirmed that Lusaka Hotels Limited had been sold to Infinity Group of Companies. The

contention is that Lusaka Hotels Limited building is the main business of Lusaka Hotels Limited, which belongs to the hospitality industry, and there is no other better business that it can do.

- 3.10 Therefore, failure by Marcus. K. Achiume to secure the building, amounts to failure to exercise a proper degree of care in the performance of the duties as Business Rescue Administrator. The argument is further that Lusaka Hotels Limited has failed to pay Mildred Sakala the amount of One Hundred and Forty-Five Thousand Two Hundred and Fifty-Three Kwacha and Ninety-Three Ngwee (K145, 253.93), which in business circles cannot be said to be a huge amount of money.
- 3.11 Consequently, it can be argued that Lusaka Hotels Limited is a company that has no prospects from being rescued from financial distress, as provided in **Section 22 (i) (a) (ii) of the Corporate Insolvency Act No 9 of 2017**. Accordingly, the alleged resolution to place the company in business rescue should be set aside.
- 3.12 Reliance is placed on the case of **Southern Place Investments 265 (Pty) Limited v Midnight Storms Investment** ⁽⁸⁾ stating that the Court in that matter, opined that the grounds for placing a company under business rescue process must be properly established. That in that respect, there must be reasonable prospects to achieve the objects of business rescue, and that no Court will grant the

application to place a company under business rescue if the application is devoid of any merit.

3.13 The argument is also that a similar approach was taken in the case of ***Swart v Beagle Run Investments 25 (Pty) Limited & others*** ⁽⁵⁾ where the Court took the view that business rescue proceedings must not be used for strategic purposes, or to delay payment to creditors or delay the inevitable liquidation of the company.

3.14 It is further argued that in the case of ***Antonio Welman v Marcelle Props 193 cc and others*** ⁽⁶⁾, the Court stated that business rescue is not for a company that is beyond the hope of rescue or a turn around.

FAILURE TO COMPLY WITH SECTION 22 (1) (b) (ii) of the CORPORATE INSOLVENCY ACT NO 9 OF 2017

3.15 It is argued on this ground, that Marcus K. Achiume is acting for Lusaka Hotels Limited, which shows that he is not independent of Lusaka Hotels Limited or its' management, contrary to the provisions of ***Section 22 (1) (b) (ii) of the Corporate Insolvency Act No 9 of 2017***. Therefore, his appointment as Business Rescue Administrator should be set aside. This Court is asked to adopt the provisions of ***Section 22 (6) (a) and (b) of the said Corporate Insolvency Act***.

FAILURE TO COMPLY WITH SECTION 32 (i) (a) (d) (i) and (iii) OF THE CORPORATE INSOLVENCY ACT NO 9 OF 2017

- 3.16 Further in argument, and on this ground, Mildred Sakala contends that Marcus K. Achiume has failed to comply with the requirements of **Section 32 (i) (a) (d) (i) and (iii) of the Corporate Insolvency Act No 9 of 2017**, in that he has not personally taken control of the affairs of Lusaka Hotels Limited. Based on that, it is argued that he does not qualify to be a Business Rescue Administrator, although he is a Business Rescue Practitioner, as he has no skills to be a Business Rescue Administrator.
- 3.17 In that respect, the argument is that in the meeting of 31st December, 2022, David Thompson, the Managing Director of Lusaka Hotels Limited, explained how he had been doing the business of the company, and not that it was under the control of Marcus K. Achiume. Further, David Thompson had explained how he feared that the company would go into liquidation, and that most of the money that the Liquidator would realise, would go to the Zambia Revenue Authority (ZRA) and the National Pension Scheme Authority (NAPSA).
- 3.18 It is also stated that David Thompson had in that meeting, indicated that this would result in the denial of payment of workers' salaries, and that properties belonging to Lusaka Hotel Limited had been sold to raise money for activities.

FAILURE TO COMPLY WITH SECTION 25 OF THE CORPORATE INSOLVENCY ACT NO 9 OF 2017

- 3.19 In respect of this allegation, the argument is that there has been failure by Marcus K. Achiume to implement **Section 25 of the Corporate Insolvency Act**, as the company has gone

into arrangements to pay ZRA and NAPSA, rather than creditors like Mildred Sakala. It is contended that in other words, Marcus K. Achiume has appointed himself as Liquidator without any legal process, as shown by the correspondence that he has written to Mildred Sakala's advocates.

FAILURE TO COMPLY WITH SECTION 36 OF THE CORPORATE INSOLVENCY ACT

3.20 As for the failure to comply with **Section 36 of the Corporate Insolvency Act No 9 of 2017**, Mildred Sakala argues that Marcus K. Achiume failed to engage her as a creditor in the activities of Lusaka Hotels Limited. It is stated that as shown in the letter of demand that was written to Marcus K. Achiume, he was requested to furnish Mildred Sakala and her advocates, copies of all the minutes of the meetings that he had with the creditors, and was asked why Mildred Sakala was not treated as one of the creditors, in a matter in which his law firm was defending Lusaka Hotels Limited, contrary to the provisions of **Section 39 of the Corporate Insolvency Act No 9 of 2017**.

3.21 The argument is further that there is no provision in the **Corporate Insolvency Act No 9 of 2017** for a Business Rescue Administrator to act as an advocate for a company that is under Business Rescue Administration, as the common law does not allow conflict of interest of the business rescue administration process.

**FAILURE TO COMPLY WITH SECTION 41 OF THE
CORPORATE INSOLVENCY ACT NO 9 OF 2017**

3.22 It is also stated that in the letter of demand, Marcus K. Achiume was requested to avail the business rescue plan, and how it was adopted, as required by **Section 41 of the Corporate Insolvency Act No 9 of 2017**. Mildred Sakala demands that the said plan be availed, and that cause be shown why she was not involved in the adoption process of the said plan.

**FAILURE TO COMPLY WITH SECTION 42 OF THE
CORPORATE INSOLVENCY ACT NO 9 OF 2017**

3.23 The argument is also that Marcus K. Achiume, has failed to comply with **Section 42 of the Corporate Insolvency Act No 9 of 2017**, in that Mildred Sakala was not involved or informed of the meeting to determine the future of Lusaka Hotels Limited as required by law.

**FAILURE TO COMPLY WITH SECTION 43 OF THE
CORPORATE INSOLVENCY ACT NO 9 OF 2017**

3.24 Mildred Sakala argues that despite Marcus K. Achiume being aware that she is a creditor of Lusaka Hotels Limited, she was not involved or informed through her lawyers of the meetings that were held to consider and approve the business rescue plan, in line with **Section 43 of the Corporate Insolvency Act No 9 of 2017**.

3.25 Therefore, the contention is that Marcus K. Achiume although qualified to be a Business Rescue Practitioner, he

has no skill to manage the functions of Lusaka Hotels Limited, and his appointment should be set aside.

3.26 Cited as authority, is the case of ***African Banking Corporation of Botswana v Kariba Furniture Manufacturers & others*** ⁽¹⁰⁾, stating that the Court in that matter, agreed that the Defendants actions were not bona fide use of Business Rescue Proceedings, and ought not to be entertained by the Court, as the companies were not financially distressed but rather, insolvent, and they did not meet the requirements of Section 21 of the Act.

3.27 It is also stated that the Court in that case, held that the Business Rescue Administrator did not possess the necessary skills to undertake Business Rescue Administration, having regard to the circumstances of the company.

3.28 In respect of this matter, the argument is that the resolution to place Lusaka Hotels Limited under Business Rescue Administration should be set aside, and that the appointment of Marcus K. Achiume as Business Rescue Administrator should be set aside, as he has failed in the performance of his work, with costs to Mildred Sakala.

4. AFFIDAVIT IN OPPOSITION

4.1 Marcus K Achiume, in opposition, states that the averments relating to when Mildred Sakala was an employee of Lusaka Hotels Limited, and how she was declared redundant, and how much is due to her, is within her exclusive knowledge. The same goes as regards how much she has been paid from

the amount due, and the demand for payment of the balance, the taking out of Court process and Judgment being entered in her favour.

- 4.2 He contends that Mildred Sakala was informed that the Court Order that entitled her to the payment of her terminal benefits came after Lusaka Hotels Limited had been placed under Business Rescue together with the consequences of Lusaka Hotels Limited having been placed under business rescue.
- 4.3 It is Marcus K. Achiume's averment, that he has been advised by his advocates, which advice he verily believes to be true and correct, that Lusaka Hotels Limited is entitled at law to debt relief, provided that it has capacity to pay, regardless that it is under financial distress. That Mildred Sakala obtained a Judgment against Lusaka Hotels Limited is not disputed.
- 4.4 Marcus K. Aciume however, deposes that Mildred Sakala by her affidavit, has shown the willingness that Lusaka Hotels Limited has exhibited to pay the Judgment sum in monthly instalments in a letter that was written to her. It is stated that Lusaka Hotels Limited has since paid Fifty Thousand Kwacha (K50, 000.00) into Court towards liquidating the debt, as evidenced by the Notice of payment into Court which is exhibited as 'MKA1'.
- 4.5 The averment is that the delay to pay was occasioned by the due process of business rescue administration, and not from insufficient properties to liquidate the debt in question.

Thus, it is stated that Lusaka Hotels Limited is a solvent debtor for purposes of paying debts, including those owed to Mildred Sakala, as shown by the approved business rescue plan which is exhibited as 'MKA2'.

- 4.6 Also deposed, is that Marcus K. Achiume as Business Rescue Administrator, engaged the creditors, save that the negotiations with the creditors, particularly those that are Government Statutory bodies, such as NAPSA and the Workers Compensation Scheme have not been concluded. Exhibited as 'MKA3' is a copy of the list of creditors.
- 4.7 As regards other credit groups, who comprise mainly the employees, and include Mildred Sakala, Marcus K. Achiume's contention is that they have been considered, and their dues have been reconciled and part payments made towards the same, as evidenced by exhibit 'MKA4'. He goes on to aver, that he has obtained a statement of account from Investrust Bank to demonstrate that Lusaka Hotels Limited has been paying towards its' indebtedness which has reduced, and that it has stopped accruing further debts as shown on exhibit 'MKA5'.
- 4.8 It is also stated that Lusaka Hotels Limited has capacity to pay its' debts, as it has assets and generates income from other activities, with exhibit 'MKA6' evidencing the transactions on the operations account. Also exhibited is 'MKA7' a statement of account from ZANACO Bank Plc, which demonstrates that Lusaka Hotels Limited is a going

concern, with activities being undertaken in the course of business.

- 4.9 The averment is further that Lusaka Hotels Limited has other sources of income, such as unpaid shares that were issued to shareholders, which it can easily call, and through equity contributions, it can raise the money claimed if it came to that point. He states that Mildred Sakala has assumed a fact based on a letter of proposal on how her debt is to be liquidated.
- 4.10 It is stated that Lusaka Hotels Limited has picked up its business which is running profitably, and it has running contracts. That in consequence, its' credit status by paying off some debts has improved, and other creditors such as Mildred Sakala have been given undertakings to be paid off, notwithstanding the payment that was earlier made.
- 4.11 Marcus K. Achiume also deposes that he has advised the proprietors of Lusaka Hotel Limited, and a call has been made for equity. Thus, one of the shareholders David Thompson has availed funds in equity to Lusaka Hotels Limited, with a view to removing the said hotel from the status of financial distress, as shown on exhibit 'MKA8' the injection of funds in equity, and making an undertaking of further funds to be availed within Three (3) to Six (6) months.
- 4.12 The averment is that Lusaka Hotels Limited is solvent and still has assets upon which it can fall, in the event that it went into further distress financially. He states that as part of the restructuring, he has entered into a contract of sale of

selected assets that belong to Lusaka Hotels Limited to improve its' financial standing. In that respect, there is exhibited as 'MKA9' a contract of sale between Lusaka Hotels Limited and Lusaka Heritage Hotel Limited.

- 4.13 Marcus K. Achiume goes on to state that Mildred Sakala was given a payment plan with respect to the payment that is due to her. However, she had issue with the timeline that Marcus K. Achiume suggested as Administrator of Lusaka Hotels Limited. He contends that he has been advised by his advocates, that Mildred Sakala's application is premature, and that other avenues could have been resorted to, in questioning Lusaka Hotel Limited's capacity to pay the Judgment debt, in lieu of instituting proceedings to challenge the Business Rescue Proceedings.
- 4.14 That in any event, Mildred Sakala cannot assume that Lusaka Hotels Limited has failed to pay the debt, in the absence of a Statutory Demand, which has not been honoured, on account of financial challenges or insufficient assets, as alleged in her affidavit.
- 4.15 It is deposed that as advised by his advocates, it would not be fair or equitable to wind up a company that is a going concern, and has capacity to pay its' debts, particularly because the purpose of business rescue is to ensure that all creditors get a better share, including Mildred Sakala. Further, it would be unfair and unjust to liquidate Lusaka Hotels Limited, a company that has potential to regain its'

position in business, save jobs and the interests of its' stakeholders, including Mildred Sakala.

- 4.16 Thus, as advised by his advocates, the call to wind up Lusaka Hotels Limited is misconceived and premature, as no circumstances exist that warrant the exercise of such jurisdiction. It is also deposed that no evidence to support the allegation of breach of the law has been provided, and that the assertion that there is no possibility of Lusaka Hotels Limited reviving its' business operations is misplaced and unfounded.

5. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN OPPOSITION

- 5.1 The argument is that the reform in insolvency legislation in Zambia has recently changed, gravitating towards the recognition that a business rescue approach is an overall better outcome for all the parties involved. It is stated that this is realised by a Business Rescue Plan, which benefits from a moratorium during the business rescue proceedings, and prevents any legal or enforcement action being undertaken against a company by any creditor.
- 5.2 The contention is that this process enables an appointed Business Rescue Administrator to execute their mandate to rescue the business without any premature enforcement or litigation from creditors.
- 5.3 In support of this position, it is stated that the Court of Appeal in the case of ***Chimanga Changa Limited v Export Trading Limited*** ⁽¹³⁾ admitted that Business Rescue

Proceedings have the potential of yielding better results to the key stakeholders, as they involve the participation of all the creditors. Thus, it builds a better platform for building consensus and focusing on the going concern of the business as opposed to winding up proceedings.

- 5.4 What constitutes financial distress of a company according to the ***Corporate Insolvency Act No 9 of 2017*** is stated, as being where a company is likely to be insolvent within the immediate ensuing Six (6) months. In terms of what insolvency means, the argument is this has been interpreted in recent cases, such as ***BNY Corporate Trustee Services Limited v Eurosail*** ⁽⁹⁾, where the Supreme Court in the United Kingdom held that it means a situation where the value of a companies' liabilities exceeds the value of its' assets.
- 5.5 Further, that the balance sheet test for insolvency must take account of the wider commercial context, in that the Courts must look beyond the assets and liabilities that are used to prepare a company's statutory accounts when deciding whether the company is insolvent.
- 5.6 It is also stated that in the case of ***Chimanga Changa Limited v Export Trading Limited*** ⁽¹³⁾, the Court of Appeal noted that:

"We shall first begin by making reference to the Corporate Insolvency Act, in Zambia which came into effect in 2019. The said Act under which the dispute falls, defines BRP as the process of

facilitating the rehabilitation of a company that is financially distressed by providing for amongst others, the temporary moratorium on the rights of claimants against the company or the implementation of a plan to rescue the company by restructuring its affairs, business, debt and other liabilities etc.”

- 5.7 The argument is that one of the issues for determination in that matter, was whether the Administrator had established that there existed reasonable prospects of rehabilitating the company, before the Court could consider an application to challenge the Business Rescue Proceedings. That in considering whether proceedings for Business Rescue can be sustained, the Court must be satisfied that the company is likely to become viable to pay its' debts, and that the Order if made, is likely to achieve an objective of administration.
- 5.8 It is further argued that in respect of a company's ability to pay its' debts, the English case of ***Re Colt Telecom Group Plc*** ⁽²⁾ is relied on, in which it was stated that the words 'is or likely' to be unable to pay its' debts means that it is more probable than not, that the company will be unable to pay its' debt distribution to one or more secured or preferential creditors.
- 5.9 Therefore, this is the applicable standard, and in that regard, the learned authors of ***Halsbury's Laws of England, Volume 7 (3), 4th Edition in paragraph 2084*** are quoted as guiding as follows:

“the affidavit must state:

The deponent’s belief that the company is or is likely to become unable to pay its’ debts and the grounds for such belief, and

Which of the specified purposes is expected to be achieved by the making of an administration order, including contingent and prospective liabilities. Details must be given of any security known or believed to be held by an creditors of the company, and whether in any case, the security is such as to confer power on the holder to appoint an administrative receiver, and if an administrative receiver has been appointed, that fact must be stated.....

If there are other matters which, in the opinion of those intending to present the petition for an administration Order will assist the Court in deciding whether to make such an Order, these matters, so far as lying within the knowledge of belief of the deponent, must also be stated. The actual duty for full and frank disclosure is owed when making an application for an administration Order is made ex-parte.”

- 5.10 It is also argued that although Sir Donald Nichols in the *Independent Report* on the company’s affairs referred to Rule 2.2 of the *Insolvency Rules of the English Insolvency Act, 1968*, his direction in the *Practice Note (Insolvency:*

Administration Order: Independent Support) is helpful in considering what an applicant who seeks business rescue proceedings ought to state in their affidavit.

- 5.11 Thus, in that regard, he directed that administration orders under *Part II of the Insolvency Act 1968* are intended primarily to facilitate the rescue and rehabilitation of insolvent, but potentially viable businesses. That it is of greatest importance that this aim should not be frustrated by expense. Further, that the extent of the necessary investigation and the amount of material to be provided to the Court, must be for the Judgment of the person who prepares the report, and will vary from case to case.
- 5.12 However, in the normal case, what the Court needs is a concise assessment of the company's situation and the prospects of an administration Order achieving one or more of the statutory purposes, and the latter will normally include an explanation on the availability of any finance required during the administration.
- 5.13 Thus, it is argued that going by the above, the application must be based on a reasonable, but objective belief supported by facts, and not mere speculation, as guided by the Court of Appeal in the case of ***Chimanga Changa Limited v Export Trading Limited*** ⁽¹³⁾.
- 5.14 Therefore, when a company does, as did Lusaka Hotels Limited, by way of special resolution, to commence business rescue, the responsibility falls on the registered Business Rescue Practitioner to take the necessary steps to assist the

company to recover from its' financial distress, which obligation Marcus K. Achiume took.

- 5.15 Cognisance is taken of the Court's power to hear and determine an application to challenge the resolution to commence Business Rescue, as provided in **Section 22 of the Corporate Insolvency Act**. The argument however, is that in doing so, the Court should consider the grounds laid out by affected person who is challenging the Business Rescue Proceedings, and consider the evidence on record to determine whether it would just and equitable to set aside such a resolution.
- 5.16 That additionally, the law is very clear that the Business Rescue Administrator shall be given sufficient time to form an opinion whether the company is financially distressed, or that there is reasonable prospect of rescue. It is stated that this position is fortified by the decision in the case of **House of Jasmine Limited v Dukon Paints (1998) Limited** ⁽¹⁴⁾, where the Court of Appeal agreed with the decision in the case of **Kunda v Konkola Copper Mines Plc** ⁽⁴⁾ where Supreme Court stated that:

“He who alleges must prove that allegation. This principle is so elementary, the court has had on a number of occasions to remind litigants that it is their duty to prove their allegation, of course it is a principle of law that he who alleges must prove the allegations.”

- 5.17 It is also argued that the issues in contention have to be clearly defined by the pleadings, as was guided in the case of ***Anderson Kambela Mazoka, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, the Electoral Commission of Zambia and the Attorney General*** ⁽³⁾.
- 5.18 Thus, Mildred Sakala as applicant, is under duty to demonstrate beyond speculation, that Lusaka Hotels Limited is not under financial distress or that there are no prospects of restoring it to a profitable business, but it should instead be liquidated. The argument is that clearly, Mildred Sakala has speculated that Lusaka Hotels Limited has been sold, and that under the guide and care of Marcus K. Achiume, the said Lusaka Hotels Limited has failed to pay its' creditors and has no reasonable prospects of bouncing back as a going concern.
- 5.19 However, it has been shown that Lusaka Hotels Limited is under financial distress as defined by the law, and that it was legitimately placed under Business Rescue. Conversely, Mildred Sakala has not shown that Lusaka Hotels Limited is either not under financial distress or that there are no reasonable prospects of it being rescued from financial distress, which are the key factors in challenging Business Rescue Proceedings.
- 5.20 The argument is further that the fact that Lusaka Hotels Limited is under financial distress is evidenced by its' failure to pay Mildred Sakala her Judgment sum, and that the said Lusaka Hotels Limited was affected by among other factors,

the outbreak of COVID 19, that heavily affected the hospitality industry, and all other sectors of the economy.

- 5.21 That is why Lusaka Hotels Limited was placed under Business Rescue, and for the Court to grant such an Order, it was satisfied that Lusaka Hotels Limited had satisfied the requirements to be placed under Business Rescue. However, the reality is that there are prospects of Lusaka Hotels Limited being rescued, which must be assessed subjectively on a case to case basis.
- 5.22 Thus, it has been shown that Lusaka Hotels Limited is a going concern as evidenced by the bank statements which show its' current transactions, as per exhibit 'MKA7' to the affidavit in opposition. Further, the said affidavit shows that the creditors of Lusaka Hotels Limited, who are mainly its' employees, are being paid, including Mildred Sakala who was paid Fifty Thousand Kwacha (K50, 000.00) on 27th March, 2023.
- 5.23 Still in argument, it is stated that Lusaka Hotels Limited has assets that can be fallen back on, to pay the creditors, who include Mildred Sakala. Further, Marcus K. Achiume has called for equity from the shareholders who have so far provided in excess of Seven Hundred and Fifty Thousand Kwacha (K750, 000.00) with an additional Three Million Two Hundred Thousand Kwacha (K3, 200, 000.00) to be availed by June, 2023, in Order to help Lusaka Hotels Limited be resuscitated from its' financial woes.

5.24 Thus, it is reasonable to assume that Lusaka Hotels Limited is capable of being rescued from its' financial distress, and that the reasonableness of prospects of the rescue lie with the Administrator, being Marcus K. Achiume.

BREACHES OF THE LAW BY MARCUS K. ACHIUME

5.25 It is reiterated that no evidence has been produced to support the alleged breaches of the law by Marcus K. Achiume. That in any event, the pleadings are silent on the alleged breach of the law. It is further contended that Mildred Sakala's grief is with how payment of her debt was structured, with an undertaking being made to pay the same by the end of June, as shown by exhibit 'MS9' to the affidavit filed in support of the Originating Summons.

5.26 Thus, by Mildred Sakala commencing this action before the expiration of that period, that is for all intents and purposes premature, as it was before the agreed date. Therefore, Mildred Sakala has failed to satisfy the requirements of ***Section 25 (5) of the Corporate Insolvency Act No 9 of 2017***, while Lusaka Hotels Limited has demonstrated that it is in financial distress and that there are prospects of it being rescued from the said financial distress.

5.27 The prayer therefore, is that the proceedings are frivolous and vexatious and lack merit, and they should be dismissed with costs to Lusaka Hotels Limited. Further, Marcus K Achiume who should be given opportunity to undertake the Business Rescue process to benefit the creditors, including

Mildred Sakala, and avoid the harsh consequences of placing Lusaka Hotels Limited in liquidation as prayed.

6. AFFIDAVIT IN REPLY

- 6.1 In reply, Mildred Sakala deposes that she has been advised by her advocates that Messrs NCO Advocates have not filed a Notice of Appointment as advocates, and their documents do not reflect which party they are representing. It is also deposed that while exhibit 'MS11' to the affidavit in opposition refers to documents, the said documents have not been exhibited.

7. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR MILDRED SAKALA

- 7.1 At the hearing, Counsel for Mildred Sakala relied on the affidavit that was filed in support of the Originating Summons, together with the List of Authorities and Skeleton Arguments in support. It was Counsel's submission, that the law in the ***Corporate Insolvency Act No 9 of 2017*** has laid down the procedure of insolvency, with ***Sections 21, 22, 33 and 43 of the said Act*** being stated as being very important.
- 7.2 The cases of ***Chimanga Changa Limited v Export Trading Limited*** ⁽¹³⁾ and ***First National Bank, First Rand Bank Limited v Metalco Industries Limited, Central Recycling Company Limited and Felix Chisambo*** ⁽¹¹⁾ were submitted as having considered the provisions of the ***Corporate Insolvency Act No 9 of 2017***, and it was stated the

Business Rescue Administrator in this matter should be removed, as he had not complied with the law.

- 7.3 The argument that in the letters of demand, request had been made for the provision of the Business Rescue Plan that had been approved by all the interested parties, but it had not been provided was reiterated. Thus, Counsel took the view that the case of ***First National Bank, First Rand Bank Limited v Metalco Industries Limited, Central Recycling Company Limited and Felix Chisambo*** ⁽¹¹⁾ was applicable to the Business Rescue Administrator.
- 7.4 Counsel further contended that Lusaka Hotels Limited is not a company under distress, but rather is a dead company that cannot be rescued at all. It was further submitted that as evidenced by the affidavit in opposition that was filed by the Business Rescue Administrator on 17th March, 2023, he had abandoned all his responsibilities, and had assigned all the duties and activities to the company which he was supposed to look after.
- 7.5 It was stated that in consequence, the company had mismanaged its' own affairs, and this is a proper case where the company should be surrendered to a Liquidator.

**RESPONSE BY COUNSEL FOR LUSAKA HOTELS LIMITED
AND MARCUS K. ACHIUME**

- 7.6 In response, Counsel stated that they had filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 17th March, 2023. The augmentation that was made, was that Lusaka Hotels

Limited was legitimately placed under Business Rescue proceedings, and Marcus K. Achiume was appointed as the Business Rescue Administrator.

- 7.7 The decision by the Court of Appeal in the case of ***Chimanga Changa Limited v Export Trading Limited*** ⁽¹³⁾ was stated as having given the conditions for a company to be placed under Business Rescue, with the primary condition having been stated as a company being under financial distress, and secondly that there is a possibility of the said company being rescued.
- 7.8 Counsel reiterated that the documents on record, clearly showed that Lusaka Hotels Limited is under distress. On the submissions that Lusaka Hotels Limited should be liquidated, Counsel stated that this Court is alive to why the ***Corporate Insolvency Act No 9 of 2017*** was enacted, submitting that it was aimed at mitigating the harsh realities of liquidation, which was confirmed in the ***Chimanga Changa*** case.
- 7.9 Reference was made to the case of ***HMRC v Rockell Drinks Distributors Limited*** ⁽⁷⁾ stating that the Court in that matter, acknowledged that the appointment of a Liquidator is a very serious step for the Court to take, as it is almost inevitable that as a result of such an appointment, the underlying business of a company is bound to cease, and the resultant damage is likely to be irredeemable.
- 7.10 Thus, the case of ***Townap Textiles Zambia Limited and Chhanganlal Distributors Limited v Tata Zambia*** ⁽¹⁾ was

cited as one, where the Court was reluctant to make a winding up Order. Counsel did however acknowledge that where the circumstances of the case are such that there are no other alternatives, the winding up Order must be made.

7.11 He stated that the principle is that an Order to liquidate a company, must be one of last resort, as was stated in the case of ***Post Newspapers Limited (in Liquidation) v Abel Mbozi and others*** ⁽¹²⁾. It was stressed that the Business Rescue Administrator in this matter, had shown beyond peradventure, that Lusaka Hotels Limited is operating as a going concern, and that it has assets over and above the indebtedness that it has.

7.12 Counsel noted that under ***Section 22 (5) of the Corporate Insolvency Act No 9 of 2017***, the Court is guided to consider whether cancellation of Business Rescue proceedings is just and equitable. In that regard, his submission was that it would not be just and equitable to kill a company that has shown some life, and has numerous beneficiaries, who are employees, other than Mildred Sakala, who have been collecting their dues from the company.

7.13 It was added that there were other creditors among them Government agencies, and that liquidation would deprive them of recovering against Lusaka Hotels Limited. Counsel further in submission, stated that Mildred Sakala in applying to set aside the Business Rescue proceedings, had advanced the reason that there had breach of the ***Corporate Insolvency Act No 9 of 2017*** by Marcus K Achiume, as he

had failed to provide the Business Rescue Plan as provided by the law.

7.14 The submission was that the said Business Rescue Plan had been exhibited as 'MKA2' to the affidavit in opposition, and there were also letters that had been exchanged between the parties in which Lusaka Hotels Limited had made proposals on how to liquidate the debt that it owed Mildred Sakala. Thus, Mildred Sakala had failed to demonstrate that Lusaka Hotels Limited is incapable of paying her debt, or that it would be just to set aside the Business Rescue proceedings, weighing Mildred Sakala's interests against those of the other stakeholders, as required by law.

7.15 The prayer was that the proceedings be dismissed so that Marcus K. Achiume could continue with his good deeds of paying the debts to Mildred Sakala among other creditors.

REPLY BY COUNSEL FOR MILDRED SAKALA

7.16 It was submitted in reply, that the ***Corporate Insolvency Act No 9 of 2017*** is an American ideal, that the South African company law had made use of. The submission was further that the said law had recognised that liquidation should be a measure of last resort. However, Counsel stated that Business Rescue Administration should be a transparent process, with all the interested parties knowing what is going on.

7.17 Counsel asked who had approved the Business Rescue Plan, when the law provides that it is the interested parties that should approve it? The decision by the Supreme Court in the

case of ***Townap Textiles Zambia Limited and Chhanaganlal Distributors Limited v Tata Zambia*** ⁽¹⁾

was acknowledged, but with a rider that the purpose and intention of Business Rescue Administration should be borne in mind, where the interested parties are meant to drive the process.

- 7.18 Counsel repeated that the Business Rescue Administrator in this matter, being Marcus K. Achiume had lamentably failed to show the Court that he held any meetings with the stakeholders, who included Government agencies and Mildred Sakala so that they could participate in the formulation of the Business Rescue Plan.
- 7.19 On Lusaka Hotels Limited being in financial distress and that it can be revived, Counsel's submission was that Mildred Sakala was declared redundant in 2018, and only Fifty Thousand Kwacha (K50, 000.00) was paid to her through the Court in February, 2023. Therefore, her contention was that Lusaka Hotels Limited is incapable of paying her debt.
- 7.20 The addition was that even after Judgment had been entered in Mildred Sakala's favour, it had not been respected by Lusaka Hotels Limited. The prayer that the said Lusaka Hotels Limited be liquidated was emphasized on the basis that it is incapable of being revived. Further, that Marcus K. Achiume should be removed as the Business Rescue Administrator.

8. DECISION OF THIS COURT

- 8.1 I have considered the matter. The provisions of the ***Corporate Insolvency Act No 9 of 2017*** which have been called into question in this matter are ***Sections 21, 22 (1) (b), 32, 33, 36, 41, and 43***. In view of those provisions, Mildred Sakala seeks an Order of this Court, to set aside the Business Rescue Proceedings that were instituted by Lusaka Hotels Limited. She further seeks an Order of this Court to set aside the appointment of Marcus K Achiume as Business Rescue Administrator.
- 8.2 Also sought as relief, is the interpretation of ***Sections 21, 22 (1) (b), 25, 32, 33, 36, 39, 41, 42 & 43 of the Corporate Insolvency Act No 9 of 2017***, an Order to appoint a Liquidator, and the provision of the documents that are contained in the demand letter.
- 8.3 It is not in dispute that Mildred Sakala obtained a Judgment against Lusaka Hotels Limited her former employer, in cause number 2022/HP/0181 on 12th October, 2022 for the payment of One Hundred and Forty-Five Thousand Seven Hundred and Fifty-Three Kwacha and Ninety-Three Ngwee (K145, 753.93). The facts that are further not in dispute are that on 1st April, 2022, Lusaka Hotels Limited filed Business Rescue Proceedings with the Registrar of Companies.
- 8.4 The decision by the Court of Appeal in the case of ***Chimanga Changa Limited v Export Trading Limited*** ⁽¹³⁾ has been referred to, where the rationale for Business Rescue Proceedings was stated as:

“We shall first begin by making reference to the Corporate Insolvency Act, in Zambia which came into effect in 2019. The said Act under which the dispute falls, defines BRP as the process of facilitating the rehabilitation of a company that is financially distressed by providing for amongst others, the temporary moratorium on the rights of claimants against the company or the implementation of a plan to rescue the company by restructuring its affairs, business, debt and other liabilities etc.

In a nutshell, one of the purposes of the BRP is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interest of all relevant stakeholders. The idea being to restore a company to profitability and avoid liquidation.”

- 8.5 The Supreme Court on appeal in that matter, under the case *Chimanga Changa Limited v Export Trading Limited* ⁽¹⁵⁾ stated as follows with regard to the objects of the Act:

“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.

- 8.6 Business Rescue Proceedings as already seen, are governed by the **Corporate Insolvency Act No 9 of 2017. Section 21 of the said Act** provides for the commencement of Business Rescue Proceedings. It states that:

“21. (1) Subject to subsection (2) (a), the member may by special resolutions, resolve that the company voluntarily begins business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that—

- (a) the company is financially distressed; and**
- (b) there appears to be a reasonable prospect of rescuing the company; and there is need to—**
 - (i) maintain the company as a going concern;**
 - (ii) achieve a better outcome for the company’s creditors as a whole than is likely to be the case if the company were to be liquidated; or**
 - (iii) realise the property of the company in order to make a distribution to one or more secured or preferential creditors.**

(2) A resolution made in accordance with subsection (1)—

(a) shall not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) becomes effective after it has been filed with the Registrar.

(3) Within thirty days after the board has filed the resolution, referred to in subsection (1), or such longer time as the Registrar, on application by the company, may allow, the company shall—

(a) give notice of the resolution and its effective date, to every affected person in the prescribed manner; and

(b) appoint a business rescue administrator.

(4) The company shall, after appointing a business rescue administrator—

(a) file a notice with the Registrar of the appointment of the business rescue administrator, within seven business days after making the appointment; and

(b) publish a copy of the notice of appointment of the business rescue administrator to each affected person, within twenty-one business days after the notice is filed.

(5) If a company fails to comply with subsection (3) or (4)—

(a) the company's resolution to begin business rescue proceedings and place the company under supervision shall lapse after a period of sixty days from the adoption of the resolution; and

(b) the company shall not file a further resolution for a period of three months after the date on which the resolution lapsed unless the Court approves the company filing a further resolution.

(6) A company that adopts a resolution to begin business rescue proceedings shall not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed as specified in subsection (5), or until the business rescue proceedings have ended as provided in section 24 (2).

(7) Where the board has reasonable grounds to believe that the company is financially distressed but does not adopt the resolution to begin business rescue proceedings, the board shall deliver a notice to each affected person and its reasons for not adopting such a resolution."

8.7 Exhibited as 'MS8' to the affidavit filed in support of the Originating Summons, is the Notice of Lodgment of the Business Rescue dated 1st April, 2022. Exhibit 'MS9' to the said affidavit is the Special Resolution dated 25th March,

2022 to commence the Business Rescue Proceedings. The basis of commencement of Business Rescue Proceedings is given in **Section 21 (1) of the Act** where the board has reasonable grounds to believe that—

- (a) the company is financially distressed; and
- (b) there appears to be a reasonable prospect of rescuing the company; and there is need to—
 - (i) maintain the company as a going concern;
 - (ii) achieve a better outcome for the company's creditors as a whole than is likely to be the case if the company were to be liquidated; or
 - (iii) realise the property of the company in order to make a distribution to one or more secured or preferential creditors.

8.8 Under **Section 21 (3) of the Act**, the company is required within Thirty (30) days of filing of the resolution with the Registrar to commence Business Rescue Proceedings to:

- (1) give notice of the resolution and its effective date, to every affected person in the prescribed manner; and
- (2) appoint a business rescue administrator.

8.9 An affected person is defined in **Section 2 of the Act**, as:

“affected person” includes a regulator, shareholder, member, director, creditor or an employee, a former employee of a company, registered trade union representing employees of the company and the Registrar;”

8.10 It is not in contention that Mildred Sakala is a former employee of Lusaka Hotels Limited, and therefore, she is an affected person. Then under **Subsection (4) of Section 21**, the company shall file a Notice with the Registrar of the appointment of the Business Rescue Administrator within Seven (7) days of such person being appointed, within Thirty (30) days of the Business Rescue proceedings being filed.

8.11 Further, the company shall publish a copy of the notice of appointment of the Business Rescue Administrator to each affected person, within twenty-one business days after the notice is filed.

8.12 As to the effect of failure to comply with the above, **Section 21 (5) of the Act** provides that:

(5) If a company fails to comply with subsection (3) or (4)—

(a) the company's resolution to begin business rescue proceedings and place the company under supervision shall lapse after a period of sixty days from the adoption of the resolution; and

(b) the company shall not file a further resolution for a period of three months after the date on which the resolution lapsed unless the Court approves the company filing a further resolution."

8.13 The law in the Act allows for challenge to the commencement of Business Rescue Proceedings with **Section 22 of the Act** stating that:

“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 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 independent of the company or its management; or***
- (ii) 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.

(2) A director who voted in favour of a resolution to begin business rescue proceedings as provided in section 21 shall not apply to the Court, as specified in subsection (1), to set aside the resolution or the appointment of the business rescue administrator, unless the director satisfies the Court that in supporting the resolution, the director acted in good faith, on the basis of information that was subsequently found to be false or misleading.

(3) An affected person making an application, in terms of subsection (1), shall—

(a) serve a copy of the application on the company and the Official Receiver; and

(b) notify each affected person of the application in the prescribed manner.

(4) An affected person may participate in the hearing of an application made in terms of this section.

(5) The Court may, when determining an application made in accordance with paragraph

(a) of subsection (1)—

(a) set aside the resolution—

- (i) on any ground set out in that subsection; or*
- (ii) if, having regard to all of the evidence, the Court determines that it is otherwise just and equitable to do so; and*
- (b) afford the business rescue administrator sufficient time to form an opinion whether—*
 - (i) the company appears to be financially distressed; or*
 - (ii) there is a reasonable prospect of rescuing the company;*

and after receiving a report from the business rescue administrator, may set aside the company's resolution, if the Court determines that the company is not financially distressed or there is no reasonable prospect of rescuing the company.

(6) The Court may, where it makes an order under paragraph (a) or (b) of subsection (5) make any further appropriate order, including— (a) an order placing the company under liquidation; or

(a)if the Court finds that there were no reasonable grounds for believing that the company is insolvent,

(b)make an order for costs against any director who voted in favour of the resolution to begin business rescue proceedings, unless the Court is satisfied that the director acted in good faith.

(7) If, after considering an application made in accordance with paragraph (b) of subsection (1), the Court makes an order setting aside the appointment of the business rescue administrator —

(a)the Court shall appoint another business rescue administrator who is qualified as specified in section 30, recommended by, or accepted by, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the Court; and
(b) the provisions of paragraph (b) of subsection (5), if relevant, shall apply to the business rescue administrator."

8.14 Then under **Section 32 of the Act**, the law provides for the powers and duties of a Business Rescue Administrator as follows:

“32. (1) A business rescue administrator, during business rescue proceedings, has, in addition to any other powers and duties set out in this Part-

(a) full management control of the company without the board and management;

(b) the power to delegate any power or function to a person who was part of the board or management of the company;

(c) the power to—

(i) remove any person from office who was part of the management of the company;

(ii) or appoint a person as part of the management of a company, subject to subsection (2); and

(d) the responsibility to—

(i) develop a business rescue plan to be considered by affected persons, in accordance with this Part;

(ii) implement a business rescue plan that is adopted in accordance with this Part; and

- (iii) *issue any notices required to be issued in relation to the business rescue proceedings.*

(2)A business rescue administrator shall not, except with the approval of the Court, appoint a person as part of the management of the company or an advisor to the company or business rescue administrator, if that person—

- (a) has any relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or*
- (b) is related to a person who has a relationship with the company as provided in paragraph (a).*

(3)A business rescue administrator, during business rescue proceedings—

- (a) is an officer of the Court and shall report to the Court in accordance with any rules of, or orders made by, the Court with respect to the proceedings;*
- (b) shall have the responsibilities, duties and liabilities of a director of the company; and*

(C) is not liable for any act or omission done in good faith in the exercise of the powers and performance of the functions of the administrator, except—

**(i) as provided in paragraph (b); and
(ii) in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of the business rescue administrator.**

(4) A business rescue administrator shall not, where the business rescue process terminates with an order placing the company in liquidation, be appointed as liquidator of the company.”

8.15 On other duties that are placed on a Business Rescue Administrator, these are set out in **Sections 33 and 36** which provide that:

“33. (1) A business rescue administrator shall, as soon as practicable after being appointed, investigate the affairs, business, property and financial situation of the company, and consider whether there is any reasonable prospect of the company being rescued.

(2) If, during business rescue proceedings, the business rescue administrator concludes that—

(a) there is no reasonable prospect of the company being rescued, the business rescue administrator shall—

(i) inform, in the prescribed manner the Court, the company and all affected persons; and

(ii) apply to the Court for an order to discontinue the business rescue proceedings and place the

company into liquidation;

(b) there are no reasonable grounds to believe that the company is financially distressed, the business rescue administrator shall inform, in the prescribed manner, the Court, company and all affected persons and-

(i) if the business rescue process was confirmed by Court order or initiated by an application to the Court, as provided in this Part, apply to the Court for an order terminating the business rescue proceedings; or

(ii) file a notice of termination of the business rescue proceedings with the Registrar.

(3) A business rescue administrator shall forward evidence to an appropriate authority for further investigation and direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company began, of—

(a) voidable transactions or a failure by a company or any director in the performance of any material obligation relating to the company;

(b) reckless trading, fraud or other contravention of any law relating to the company.”

8.16 Then with regard to creditors, **Section 36** states that:

“36. (1) A creditor is entitled to—

(a) notice of every Court proceeding, decision, meeting or other event concerning the business rescue proceedings;

(b) participate in any Court proceedings arising during the business rescue proceedings; and

(c) participate in business rescue proceedings to the extent provided in this Part.

(2) In addition to the rights set out in subsection (1), a creditor has-

(a) the right to vote to amend, approve or reject a proposed business rescue plan, as provided in this Part; and

(b) a further right, if the proposed business rescue plan is rejected, to—

(i) propose the development of an alternative plan as provided in this Part, within thirty days; or

(ii) present an offer to acquire the interests of any or all of the other creditors as provided in this Part, within thirty days.

(3) The creditors of a company are entitled to form a creditors' committee through which the creditors are entitled to be consulted, by the business rescue administrator, during the development of the business rescue plan.

(4) In making a decision under this Part—

(a) a secured or unsecured creditor shall have a voting interest equal to the value of the amount owed to that creditor by the company; and

(b) a concurrent creditor who would be subordinated in a liquidation shall have a voting interest, as independently and expertly appraised and valued at the request of the business rescue administrator, equal to the amount that

the creditor could reasonably expect to receive in a liquidation of the company.

(5) A business rescue administrator shall—

- (a) determine whether a creditor is independent for the purposes of this Part;*
- (b) request a suitably qualified person to independently and expertly appraise and value an interest referred to in subsection (4) (b); and*
- (c) give a written notice of the appraisal and valuation to the person concerned, at least fifteen days before the date of the meeting to be convened under section 42.*

(6) A person aggrieved with the business rescue administrator's determination, as provided in subsection (5), may, within fourteen days after receiving a notice of a determination, apply to the Court to—

- (a) review the business rescue administrator's determination that the person is, or is not, an independent creditor; or*
- (b) review, re-appraise and re-value that person's voting interest, as specified in subsection (5)."*

8.17 When it comes to the Business Rescue Plan, **Section 41 of the Act** is as follows in provision:

“41. (1) A business rescue administrator shall, after consulting the creditors, the management of the company, and where applicable, shareholders, prepare a business rescue plan for consideration and possible adoption at a meeting held in accordance with section 42.

(2) A business rescue plan shall contain all the information reasonably required to assist the affected persons in making the decision to accept or reject the plan, which plan shall be divided into three Parts as follows:

(a) Part A shall contain background information and shall include—

(2) A business rescue administrator shall give seven days’ notice of the convening of the first meeting of creditors to every creditor whose name and address is known or can reasonably be obtained setting out the—

(i) a complete list of all the material assets of the company, indicating which assets were held as security at the commencement of the business rescue proceedings;

(ii) a complete list of creditors at the commencement of the business rescue proceedings and a categorisation of

creditors as secured, statutory preferential creditors, concurrent or unsecured;

- (iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation*
- (iv) a complete list of the holders of the company's issued securities;*
- (v) a copy of the written agreement relating to the business rescue administrator's remuneration;*
- (vi) a statement as to whether the business rescue plan includes a proposal made informally by a creditor; and*
- (vii) a statement as to the basis for the business rescue administrator's remuneration;*

Part B shall include the following proposals:

- (ii) the nature and duration of any moratorium for which the business rescue plan makes provision;*
- (ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company or another company;*
- (iii) the ongoing role of the company,*

and the treatment of any existing agreements;

- (iii) the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;*
- (v) the order of preference in which the proceeds of the property of the company shall be applied to pay creditors if the business rescue plan is adopted;*
- (iv) the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and (vii) the effect that the business rescue plan shall have on the holders of each class of the company's issued securities;*

Part C shall contain assumptions and conditions, including the following:

- (i) a statement of the conditions that need to be satisfied for the business rescue plan to come into operation and be fully implemented.*
- (ii) the effect, if any, that the business rescue plan shall have on the number of employees and their terms and conditions of employment;*

- (iii) *the circumstances in which the business rescue plan will terminate; and*
- (iv) *a projected financial statement for the next three years, prepared on the assumption that the proposed business plan is adopted.*

(3) The financial statements referred to in subsection (2) (c) (iv)—

(a) shall include a notice of any material assumptions on which the projections are based; and

(b) may include alternative projections based on varying assumptions and contingencies.

(4) A business rescue administrator shall conclude a proposed business rescue plan with a declaration stating that—

(a) information provided appears to be accurate, complete and up to date; and

(b) projections provided are based on estimates made in good faith and on factual information and assumptions as set out in the statement.

(5) A company shall publish the business rescue plan within thirty days after the date on which the business rescue administrator was appointed, or such longer time as may be allowed by—

- (a) the Court, on application by the company; or*
- (b) the holders of a majority of the creditors' voting interests."*

8.18 **Section 43 of the Act** provides for consideration and approval of a business rescue plan by stating that:

"43. (1) A business rescue administrator shall, at a meeting convened in accordance with section 42—

- (a) introduce a proposed business rescue plan for consideration by the affected persons and, where applicable, by the shareholders;*
- (b) inform the meeting on whether a reasonable prospect of the company being rescued continues to exist;*
- (c) invite discussion and conduct a vote on any motions to—*
 - (i) amend the proposed plan as proposed and seconded by the affected person which have a positive effect on the business rescue plan; or*
 - (ii) adjourn the meeting in order to revise the plan for further consideration; and*
- (d) call for a vote for preliminary approval of the proposed business rescue plan or the plan as amended, if applicable, unless the meeting*

has first been adjourned in accordance with subsection (2) (c) (ii).

(2) A proposed business rescue plan shall be approved, at a meeting convened in accordance with section 42, on a preliminary basis if in a vote called in accordance with subsection (1) (d)—

- (a) it is supported by the holders of more than seventy-five percent of the affected persons' voting interests; and*
- (b) the votes in support of the proposed plan include at least fifty percent of the independent creditors' voting interests, if any.*

(3) Where a proposed business rescue plan—

- (a) is not approved on a preliminary basis, as provided in subsection (2), the plan shall be considered as having been rejected and may be considered further as provided in section 44;*
- (b) does not alter the rights of the holders of any class of the company's securities, the approval of the plan on a preliminary basis as provided in subsection (2) shall constitute the final adoption of the plan, subject to satisfaction of any conditions on which that plan is contingent; or*

(a) satisfy any conditions that have been imposed relating to a business rescue plan; and

(b) implement the business rescue plan as adopted.

(6) A business rescue administrator may, in order to implement a business rescue plan that has been adopted—

(a) determine the consideration for, and issue, any authorised securities of the company, despite the Companies Act, 2017 or Securities Act, 2016 relating to the procedures to be followed for the issuance of shares and for the determination of consideration to be received for the issued shares; and

(b) amend the company's articles of association to authorise and determine the preferences, rights, limitations and other terms of any securities that are not otherwise authorised, but may be issued in terms of the business rescue plan, notwithstanding the provisions of the Companies Act, 2017, or the Securities Act, 2016, relating to amendment of the articles of association, the authorisation of shares to be issued and the preferences, rights, limitations and other terms that apply to those shares.

Except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder of the company, as provided in the Companies Act, 2017, or Securities Act, 2016, shall not apply to an issue of shares by the company in terms of the business rescue plan.

(8) A business rescue administrator shall, when the business rescue plan has been substantially implemented, file a notice of the substantial implementation of the business rescue plan with the Registrar and official Receiver.

8.19 Having looked at the Sections whose provisions are sought to be interpreted, the question that arises is whether the proceedings are properly before me. The provisions of **Section 22 of the Act**, that have been highlighted above, are that an affected person may apply to a Court 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 43**, to challenge the Business Rescue Proceedings.

8.20 It has been seen that the resolution to adopt the Business Rescue Proceedings was made on 25th March, 2022. The contention by Mildred Sakala is that the Business Rescue Plan has not been adopted in line with **Section 41 of the Act** as she as a creditor, was not called to any meeting to consider the adoption of the Business Rescue Plan.

- 8.21 In opposition, Marcus K. Achiume contends that there is an approved Business Rescue Plan. That document is exhibited as 'MKA2' to the affidavit in opposition. The said Business Rescue Plan does not show that it was approved by any persons, but shows that it was prepared in 2023. Marcus K. Achiume has not disputed Mildred Sakala's assertion that she as a creditor, and an affected person was not called to any meeting where the Business Rescue Plan was considered.
- 8.22 The provisions of **Section 41 of the Corporate Insolvency Act No 9 of 2017** are very clear, that a Business Rescue Plan is prepared by a Business Rescue Administrator after consulting the creditors, the management of the company, and where applicable, shareholders which is considered and possibly adopted at a meeting held in accordance with **Section 42**.
- 8.23 Therefore, there being no evidence to rebut Mildred Sakala's assertion, that as a creditor, she was not called to any meeting where she was consulted on development of the Business Rescue Plan and participated in its' adoption, the only reasonable inference I can draw, is that there was no such meeting.
- 8.24 That being the position, as there is no approved Business Rescue Plan, from the time that a resolution was made on 25th March, 2022 to place Lusaka Hotels Limited under Business Rescue Proceedings, Mildred Sakala is within the

provisions of the law to challenge the Business Rescue Proceedings, in line with **Section 22 of the Act**.

8.25 The grounds upon which Mildred Sakala seeks to challenge the Business Rescue Proceedings is that Lusaka Hotels Limited has not complied with the law in **Section 21 of the Act** and that the appointment of its' Business Rescue Administrator, Marcus K. Achiume should be set aside.

8.26 **Section 22 of the Act** provides that Business Rescue Proceedings may be set aside;

1. *there is no reasonable basis for believing that the company is financially distressed;*
2. *there is no reasonable prospect for rescuing the company; or*
3. *the company has failed to satisfy the procedural requirements set out in section 21;*

8.27 **Section 21 of the Act**, as already seen, provides that within Thirty (30) days after the Board has filed the resolution, to commence business rescue, or such longer time as the Registrar, on application by the company, may allow, the company shall give notice of the resolution, and its' effective date, to every affected person in the prescribed manner; and appoint a Business Rescue Administrator.

8.28 Further, the company shall, after appointing a Business Rescue Administrator, file a notice with the Registrar of the appointment of the Business Rescue Administrator, within seven business days after making the appointment; and publish a copy of the notice of appointment of the Business

Rescue Administrator to each affected person, within twenty-one business days after the notice is filed.

- 8.29 There is nothing on record evidencing such compliance with **Section 21 of the Act**. When it comes to the failure to comply with **Section 21 of the Act** the law is that the company's resolution to begin business rescue proceedings and place the company under supervision shall lapse after a period of sixty days from the adoption of the resolution, and the company shall not file a further resolution for a period of three months after the date on which the resolution lapsed, unless the Court approves the company filing a further resolution.
- 8.30 There having been no compliance with the law as provided in **Section 21 of the Act**, and Lusaka Hotels Limited and Marcus K. Achiume not having provided any evidence that the Registrar did extend time as provided in the said **Section 21 of the Act**, the resolution to commence the Business Rescue Proceedings did in fact lapse Sixty (60) days after the resolution was made on 25th March, 2022.
- 8.31 The law requires compliance with the provisions of **Section 21 of the Act** to ensure the involvement of creditors in the process to give it legitimacy.
- 8.32 Consequently, there are no Business Rescue Proceedings that are validly in place currently, and the application to set them aside becomes otiose. That being the position, Marcus K. Achiume is not a legitimate Business Rescue

Administrator for Lusaka Hotels Limited, and the relief sought to set aside his appointment becomes academic.

8.33 All in all, there is no relief that can be granted, the resolution to commence Business Rescue Proceedings having lapsed, and I dismiss the matter, with costs to Mildred Sakala. Leave to appeal is granted.

DATED AT LUSAKA THE 29th DAY OF DECEMBER, 2023

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

