

IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT KABWE

APPEAL NO.4/2007

B E T W E E N:

LIVINGSTONE MOTOR ASSEMBLERS LIMITED
(IN RECEIVERSHIP)

APPELLANT

AND

INDECO ESTATES DEVELOPMENT COMPANY LIMITED 1ST RESPONDENT

AND

WEBSTER MWANSA
ASSOCIATED STORES LIMITED
TALWANDI ELECTRICAL LIMITED
ALEX MUTALE AND 136 OTHERS

2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT

CORAM: LEWANIKA, DCJ, MUMBA, CHITENGI, JJS
On the 7th day of August, 2007 and 11th September, 2007

For the Appellant: N.K. MUBONDA of D.H. Kemp & co.
For the 5th Respondent: A.R. CHIPANDE of Livingstone Partners

RULING

LEWANIKA delivered the judgment of the Court.

AUTHORITIES REFERRED TO:

1. ZAMBIA REVENUE AUTHORITY VS HITECH TRADING COMPANY LTD, 2001 Z.R.
17

Counsel for the 5th Respondent has filed a Notice of Motion pursuant to Order 59, Rule 10(10) of the Rules of the Supreme Court for leave to adduce fresh evidence. The application is supported by an affidavit sworn by one Germano Mutale KAULUNGOMBE the liquidator of the Appellant Company. The fresh evidence that is sought to be adduced consists of

documents annexed to the affidavit of Mr. KAULUNGOMBE as exhibits 'GMK 1' to 'GMK 10'. In making the application Counsel for the 5th Respondent said that these documents constitute fresh or new evidence which has come into being since the Ruling of the Court below. He said that exhibit 'GMK 7 to 9' is a Memorandum of Discharge by the secured creditor dated 5th September, 2006. He said that this document shows that the secured creditor being the Zambia National Commercial Bank has since received all the monies borrowed by the company thereby uplifting the receivership. That exhibit 'GMK 10' is a letter by the Receiver Manager dated 29th August, 2006 confirming that the receivership had been uplifted and the Receiver Manager has rendered his bill to the purchaser of the company. He also referred to exhibit 'GMK 1' which is a letter dated 1st August, 2007 written by the Legal Counsel of the Zambia National Commercial Bank to the Receiver Manager giving him instructions.

Counsel said that these documents constitute new and fresh evidence and are very material to this appeal but are not part of the record of appeal. He prayed that the 5th Respondent be granted the motion to adduce fresh evidence and that a supplementary record of appeal be filed.

Counsel for the Appellant said that he was opposing the application and relied on the affidavit in opposition and also the list of authorities.

Counsel pointed out that all the documents that the 5th Respondent seeks to adduce were generated sixteen months after the Ruling was made. He said that the letters were written in August to September, 2006. Counsel referred us to our decision in the case of **ZAMBIA REVENUE AUTHORITY VS HITECH TRADING COMPANY LIMITED** (1). He said that the evidence sought to be adduced was not in existence as at April 2005 and that this evidence which has been generated subsequent to the Ruling does not meet the standard set by the law and urged us to refuse the application.

We have considered the arguments and submissions of Counsel for the Appellant and for the 5th Respondent. The law on introducing new evidence on appeal is to be found in Section 25 of the Supreme Court Act as well as Order 59/10 of the Rules of the Supreme Court, 1999 edition. In the case referred to us by Counsel for the Appellant, we had restated the principles set out in **LADD VS MARSHALL 1954, 3 A.E.R. 745** that for an application to introduce new evidence to succeed, it must be shown that the evidence could not be obtained with reasonable diligence at trial; that the evidence will have an important influence on the result of the case and that the evidence will be credible.

In the application before us, we are faced with a situation where the Ruling appealed against was made on 21st April, 2005. The new evidence

that is sought to be produced was generated in August to September, 2006 and was therefore not available to the learned Judge in the court below at the time that he made his Ruling. The 'new evidence' has created a new situation which did not exist at the time that the Ruling was made. It cannot, in our view, be called upon in aid of an appeal made against a Ruling made on 21st April, 2005. The motion is denied with costs. The costs are to be taxed in default of agreement.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

F.N.N. Mumba
SUPREME COURT JUDGE

P. Chitengi
SUPREME COURT JUDGE