IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 24 OF 2011

HOLDEN AT KABWE

(Civil Jurisdiction)

B E T W E E N:

**JOHN KANYANTA MUTALE** APPELLANT

AND

**ACCESS FINANCIAL SERVICES LIMITED** RESPONDENT

CORAM: **MWANAMWAMBWA, WANKI AND MUSONDA, JJS**

On the 10th August, 2011 and 23rd January, 2012

For the Appellant: Mr. K.I. Mulenga, of Messrs. Kamasonde Chambers

For the Respondent: Mr. H.A. Chizu, of Messrs. Chanda, Chizu Associations

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**J U D G M E N T**

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**WANKI, JS, delivered the judgment of the Court.**

CASES REFERRED TO:

1. **Credit Africa -Vs- Elias Namo Kundiona, (2003) ZR. 61**
2. **Costellow -Vs- Somerset County, (1993) 1 ALL ER 952.**
3. **Zambia Revenue Authority -Vs- Jayesh Shah, (2001) ZR 60.**
4. **Trade Kings Limited -Vs- Unilever Plc, Cheesebrough Ponds (Zambia) Limited, Lever Brothers (Zambia) Limited (2000) ZR 16.**
5. **The attorney General -Vs- Marcus Kampumba Achiume, (1983) ZR 1.**
6. **Wilson Masauso Zulu -Vs- Avondale Housing Project Limited, (1982) ZR 172.**

LEGISLATION REFERRED TO:

1. **Companies Act, Chapter 388 of the Laws of Zambia Sections 317 and 351.**
2. **Banking and Financial Services Act, Chapter 387 of the Laws of Zambia, Sections 101, 105, 106 and 107.**

The appellant being dissatisfied with the Judgment given by the High Court at Lusaka on the 29th December, 2010 appealed to the Supreme Court against the whole judgment.

The facts leading to the appeal are that the appellant took out a Writ of Summons against the respondent at the Principal Registry in which he claimed for:-

1. The sum of K328,333,234.00 accrued terminal benefits.
2. A declaration that the respondent discriminated against the appellant in refusing and ignoring to pay him his accrued terminal benefits.
3. Interest.
4. Costs.
5. Any other relief.

The Writ of Summons was supported by a statement of claim which showed that: the appellant was employed by the respondent, as an accountant on 2nd January, 1997 and resigned on 14th May, 2008. At the time of the appellant’s resignation from the respondent’s employment, his accrued benefits amounted to K328,333,234.00. Since the appellant’s resignation from the respondent’s employment, the respondent has refused and ignored to pay the appellant the sum of K328,333,234 accrued benefits in accordance with the company’s conditions of service. The respondent by refusing to pay the appellant his accrued terminal benefits while three former employees, namely, Chinyemba TAMBU, Esnart SHANSONGO and Judy SHAKALIMA were paid in full their benefits on their resignation from the respondent’s employment, the respondent discriminated against the appellant based on gender basis.

The respondent filed a defence which showed that the respondent was under compulsory liquidation pursuant to powers exercised by the Bank of Zambia in accordance with the provisions of the Banking and Financial Services Act; the respondent being in liquidation could only pay out, resources permitting, a proportion of the amount due in accordance with the settlement procedures beginning with secured creditors and then in order of priority of unsecured creditors; the respondent disputed the quantum; the respondent was entitled by statute as an agent of the Bank of Zambia to stop or limit the payment of any obligation concerning a company in possession of the Bank of Zambia; the respondent at the material time was under an order of possession of the Bank of Zambia; and the respondent pleaded the terms of **Section 84A (c) of the Banking and Financial** **Services Act,** as a bar to relief against the appellant.

His evidence was that in 2003, the Bank of Zambia took over the operations of the respondent. They, however, continued working and later they were retired in accordance with their conditions of service. The conditions provided for a package which was supposed to be paid to him following his resignation.

The conditions were not changed after the possession of the respondent by the Bank of Zambia. Upon his resignation, he had not been paid his terminal benefits. The benefits included 3 months pay for every year worked less what he owed the respondent. The amount of K338,333,234 which he claimed came from the respondent’s advocates. In the letter they wrote to his advocates, document 13 in the plaintiff’s bundle, they had computed the terminal benefits. He was not paid after that correspondence.

Marshall Aggrey MWANSOPELO, Senior Inspector of Non-Bank Financial Institution at Bank of Zambia gave evidence on behalf of the respondent. He stated that, currently he was serving as Liquidation Manager of the Access Financial Services, the respondent and Access Leasing Limited. He had not paid the appellant because the access companies had been placed into liquidation by the time they were trying to consider his claim. The Liquidation Schedule of the companies had not yet been filed into Court.

There were two reasons why the schedule had not yet been filed into Court. First is that, in January, 2009 the shareholders and former Directors filed an objection to the liquidation, as a result he could not prepare and file into Court a liquidation schedule of the access companies. Secondly, the appellant was an ordinary creditor of the company, who ranked below preferential and secured creditors.

He had not yet filed the liquidation schedule as it was submitted to Bank of Zambia for consideration. The objection that was raised by the Shareholders and Directors was dismissed by the Court on 7th September, 2010. The appellant’s claim was not in dispute but it was premature. The Liquidation acknowledged its debt to the appellant.

The Court below, after considering the evidence before it found that, it was not in dispute that the respondent owed the appellant the sum of K328,333,234.00 that has been claimed. The respondent’s only contention is that payment has not been effected for two reasons; that the liquidation schedule has not been filed yet; and that the appellant is not a secured creditor and therefore, there are other preferential creditors to be paid first. The Court below further found that, the respondent was placed in compulsory liquidation by the Bank of Zambia. This meant that certain legal steps had to be taken. Payments could not be made unless those steps were taken.

Among the steps to be taken is a requirement that creditors with claims such as the appellants must file their claims. **Section** **107 of the Banking and Financial Services Act**,(7) provides for the priority by which the creditors should be paid. Therefore, while the appellant has a claim against the respondent, his action to enforce that claim is premature. The Court below therefore dismissed the action with costs to the respondent.

The appellant has in his Memorandum of Appeal advanced two grounds of appeal, namely:-

**GROUND ONE:**

**That the Court below misdirected itself, both in law and fact when it held that the respondent was placed in compulsory liquidation by the Bank of Zambia. This meant that certain legal steps had to be taken. Among the steps to be taken is a requirement that creditors with claims such as the appellant must file their claims.**

**GROUND TWO:**

**That the Court below misdirected itself both in law and fact when it held that Section 107 of the Banking and Financial Institutions Act provides priority by which the creditors should be paid. Therefore, while the appellant had a claim against the respondent his action to enforce the claim in Court was premature.**

The parties filed respective heads of argument and authorities on which they relied.

In support of ground one of appeal, it was pointed out that, the appellant in his evidence to the Court below alluded to the fact that he became aware that the respondent was in liquidation between December, 2008 and January, 2009 after he had already commenced the action against the respondent.

It was further pointed out that, the appellant’s claims against the respondent had been a subject of discussion between the two parties as far back as June, 2008 and the Liquidation Manager was aware of the appellant’s claims. The respondent was about to make payment to satisfy the appellant’s claim on 27th November, 2008, the same day the respondent was placed on compulsory liquidation, as could be seen from correspondence on page 36 of the record of appeal.

It was argued that, it is therefore surprising that while the Court below acknowledged the existence of the appellant’s claims against the respondent, it made a finding that the appellant must file his claims like any other creditor of the respondent in liquidation.

This was a clear misdirection on the part of the Court below. The question of the appellant having not filed his claim against the respondent was neither pleaded by the respondent nor was evidence adduced at the trial to this effect. In fact, they were of the view that, instead of dismissing the appellant’s application on the finding it made, the Court below should have taken judicial notice on the evidence available to it, that the appellant’s claims against the respondent had been a subject of discussion long before the respondent was placed on voluntary liquidation; and that the respondent knew about it.

In support of ground two, it was pointed out that, it would be noted from the record of appeal, at page 48 lines 3 to 6 that the appellant was granted leave to proceed against the respondent in liquidation. Such an application under **Section 317** of the **Companies Act** (7) could be made either before commencing an action against a company in liquidation, or where the action was already commenced, before proceeding with the matter further as was the case in this matter. This is a requirement of law that the High Court should be aware of. This matter was clearly stated in the case of ***CREDIT AFRICAN BANK LIMITED (In Liquidation) -VS- ELIAS NAMO KUNDIONA*** (1) where it was held that:

**“1. The purpose of Section 317 of the Companies Act is to ensure that when a Company goes into liquidation, the assets of the company are admitted in an orderly fashion for the benefits of all creditors and that particular creditors should not be able to obtain an advantage by bringing proceedings against the Company. What is contemplated is that the High Court shall be seized with all these matters and shall see that the affairs are wound up in a dignified and orderly way.**

**2. An application for leave under Section 317 of the Companies Act is not intended to determine any issue between parties nor is it intended to determine whether the person suing the company in liquidation has a good case against the company. It is procedure designed to inform the High Court that the company sued is in liquidation, so that when need be the High Court can supervise the liquidation.”**

It was further pointed out that, it would also be noted from the record of appeal at page 53 lines 14 to 21 that the two reasons why the Liquidation Manager of the respondent had not paid the appellant his claims, were because the respondent had been placed into liquidation by the time the appellant’s claims were being considered; and that the liquidation schedule of the respondent had not yet been filed into Court.

It was submitted that, now that the Court was aware of the reasons for none payment of the appellant’s claims, the Court instead of dismissing the appellant’s claims, should have ordered the Liquidation Manager to expedite the filing of the liquidation schedules into Court since there was no indication as to when the same would be filed into Court.

In this day the Court would have exercised its jurisdiction in accordance with the provisions of **Section 317 of the Companies** **Act**, (7) because what is contemplated in the Section is that the High Court is seized with all the matters to ensure the affairs are wound up in a dignified and orderly way.

There was, therefore, need for the Court below to exercise its supervisory role as envisaged by the law. The Court had a duty to adjudicate upon every aspect of the suit so that every matter in controversy could have been determined in finality. In the process, the dispute between the parties remained unresolved. It has been pointed out that, one point which immediately comes out of the judgment is that the learned trial Judge did not in fact adjudicate upon the action and the issues actually presented to the appellant.

It was submitted that, after having granted leave to the appellant to proceed against the respondent in liquidation; the Court should have provided guidance as to the manner the action was to proceed as envisaged by **Section 317 of the Companies** **Act**.(7) If indeed the enforcement of the appellant’s claim was premature, the Court should have given guidance as to what the next cause of action, for example, to compel the respondent to file into Court, within a specified period of time, the legal steps that required to be taken than leaving the issues between the two parties unresolved.

It was pointed out that, **Section 107(1) of the Banking and** **Financial Services Act**, (11) provides priority in which creditors should be paid in a situation like this.

However, in the case of other claims not included in the priority of Creditors, the Court is empowered in **Section 107** (11) to determine, upon application by the Bank of Zambia, the order of priority of such claims.

It was further pointed out that, in his evidence, DW1 told the Court at page 54 lines 10 - 12, that he had not filed the liquidation schedule, but it had been prepared and submitted to the Bank of Zambia for consideration. The Bank of Zambia did not take steps to have the same filed into Court though the said liquidation schedules were submitted to them before the matter came up for hearing, the Bank of Zambia did not take steps to have the same filed into Court bearing in mind that there was a claim against the respondent pending before the Court. This was, therefore, the opportune time for the Court to exercise its jurisdiction pursuant to **Section 107** **of the** **Banking and Financial Services Act** (11) to order the Bank of Zambia to file into Court the liquidation schedule submitted to them by the Liquidation Manager to assist the Court determine the appellant’s claim against the respondent. It was a clear misdirection by the Court below to dismiss the appellant’s action. It was the appellant’s prayer, that the findings of the Court below be overturned in his favour.

It was submitted that, the Court below misdirected itself both in law, and fact by dismissing the appellant’s application purely on procedural default. In support, we were referred to the case of ***COSTELLOW -VS- SOMERSET COUNTY COUNCIL*** (2) where it was held that:

**“The plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which, an award of costs cannot compensate.**

**A rigid mechanistic approach is inappropriate and only serves to deny the plaintiff his right to be heard and have his matter determined on its merit.”**

We were further referred, to the case of ***ZAMBIA REVENUE*** ***AUTHORITY -VS- JAYESH SHAH*** (3) in which it was held that:

**“Cases should be decided on their substance and merit where there has been only very technical omission or oversight not affecting the validity of process.”**

It was further submitted that, there was nothing in the judgment of the Court below which suggested that the trial Court had fully evaluated, and analysed the evidence which had been presented before it on behalf of the appellant. This approach fell short of the guidelines which had been prescribed and articulated by this Court in its numerous decisions which include the case of ***TRADE KINGS LIMITED -VS- UNILEVER PLC, CHEESEBROUGH PONDS*** **(ZAMBIA)** ***LIMITED AND LEVER BROTHERS (ZAMBIA LIMITED*** (4) in which we stated that:

**“One point which immediately stands out and which emerged and which appeared to be common cause was that, the learned trial Judge did not in fact adjudicate upon the action and the issues actually presented by the respondents.”**

We were further referred to the case of ***ATTORNEY GENERAL -VS- MARCUS KAMPUMBA ACHIUME*** (5) in which we held that:

**“An unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection which no trial Court should reasonably make, and entitles the appeal Court to interfere.”**

Similarly, in the case of ***WILSON MASAUSO ZULU -VS-*** ***AVONDALE HOUSING PROJECT LIMITED*** (6) in which we held that:

**“I would express the hope that trial Courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality.**

**A decision which became of uncertainty or want of finality, leaves the doors open for further litigation aver the same issues between the same parties can and should be avoided.”**

It was submitted that, the Court below exercised bias towards the appellant throughout the proceedings before it. The bias towards the appellant was even more pronounced in the manner the Court handled the application for Stay of Execution of the Judgment appealed against.

It was pointed out that, the Court would note from the proceedings of the Court below of the 10th May, 2011 on pages 1 - 2 of the Supplementary record of appeal that the order therein is very clear. However, when Counsel for the appellant filed the same in Court on the 12th May, 2011, it was altered by the Court at pages 3 to 4 to read like the one on page 5 of the record.

It was further, pointed out that, it was evident from the above that the Court was caught up in its web of finding fault in the appellant’s application at all stages of the proceedings. As a result of the Courts biasness towards the appellant and in the context of the Judgment appealed against, there was nothing to suggest that the trial Judge had seriously analysed or evaluated the evidence that had been adduced before him before he came to the conclusion that he did, and that failure to analyse the evidence amounted to a misdirection which no Court should reasonably make and coupled with the bias that the Court had exhibited towards the appellant, entitles the Court to interfere.

In response, to ground one of appeal, it was submitted that, the Court was on firm grounds when it held that the respondent was placed in compulsory liquidation by the Bank of Zambia. This meant that certain legal steps had to be taken. Among the steps to be taken was a requirement that creditors with claims such as the appellant must file their claims.

It was pointed out that, as the Court below observed, the facts were clear and there was no dispute on the issue of the debt. The only issue which the Court addressed its mind was, in such circumstances and according to law, what should be done.

It was argued that, the Court below properly addressed its mind to the law and legal requirement where the company is placed under liquidation. It was also clear and undisputed fact that at the time of instituting this action, the respondent had been placed under liquidation. The proper procedure for the appellant to do which the law has stipulated was to file claims first in accordance with **Section 105 of the Banking and Financial Services Act**.(9) It was therefore, not proper for the appellant to rush to Court before complying with the statutory provisions.

It was pointed out that, the law with regard to liquidation of companies, specially relating to the appellant’s claim for payment of terminal benefits was very well settled in Zambia. The legal regime that guides and regulates the settlement of the respondent’s debts and liabilities was elaborately enshrined in the **Banking and Financial** **Services Act**.

It was further, pointed out that, it was not in dispute that the Bank of Zambia, in exercise of its supervisory and regulatory powers over the respondent, invoked its powers vested in it by **Section 101** **of the Banking and Financial Services Act** (8) and resolved to place the respondent under compulsory liquidation on the 27th November, 2008. That resolution entailed that certain process, relevant to the issue at hand, had to be followed and complied with as demanded by law.

The provisions that were brought into play were **Section 101 (3)** **of the Banking and Financial** **Services Act** (8) which entitles any interested party to file an objection or appeal to the Court against such a resolution, and as the Liquidation Manager, DW1 testified on behalf of the respondent, an objection was indeed filed into Court, but was only disposed off in September, 2010.

The other provision relevant to the liquidation process is **Section 105 of the Banking and Financial Services Act** (9) which provides that:

**“Within six months after the last day specified in the customer’s statement for the filing of claims the Bank of Zambia shall -**

1. Defer payment of any claim that is out of time and reject any claim that appears to be of doubtful validity;
2. Determine the amount, if any, owing to each known depositor or other creditor and the property class of his claim in accordance with this party;
3. Prepare for filing with the Court a schedule of the steps it proposes to take (in this part called a “liquidation schedule;”
4. Notify each person whose claim has not been allowed in full and publish once a week for three consecutive weeks, in a newspaper of general circulation in every place in Zambia where the bank had a branch, a notice of the date and place where the liquidation schedule will be available for inspection, and the date, not earlier than thirty days after the date of the third publication of the notice, on which the Bank of Zambia will file the schedule with the Court.”

Further **Section 106(1) of the Banking and Financial Services** **Act** (10) provides that within twenty days after the filing of the liquidation schedule, any depositor, other creditor or owner of bank, and any other interested party, may file with the Court an objection to any step proposed.

(2) ………………………………………

(3) ………………………………………

(4) ………………………………………

(5) As soon as possible after all objections have been decided, the Bank of Zambia shall make final distribution.

In response to ground two of appeal, it was submitted that, the Court below was on firm grounds when it held that **Section 107** **of the Banking and Financial Services Act** (9) provides priority by which the creditors should be paid. Therefore while the appellant has a claim against the respondent, his action to enforce the claim in Court is premature.

It was pointed out that, as already argued and established in ground one, it was not in dispute that the respondent was placed under liquidation before the appellant could be paid his dues. Evidence from both the appellant’s witness and the respondent’s witness was clear on this fact.

It was further pointed out that, evidence showed how the respondent also treated the claim in accordance with the law as provided in **Section 107(1) of the Banking and Financial Services** **Act**,(11) the appellant cannot be paid all terminal benefits in these circumstances as a first payee before others.

The law provides the preference and lists the numerical order in which once liquidation process commence how the payments would be treated. Similarly, **Section 346(1) of the Companies Act** (12) provides for the payment of debts of a company under liquidation.

It was argued that, it was clear from the pleadings, documents and the evidence on record in the Court below, that the appellant’s case was not outside the ambit of the liquidation laws for him to be entitled to the immediate payment of his terminal benefits.

It was submitted that, the law has vested the Courts with the power and responsibility to supervise and monitor the liquidation of company, to ensure total compliance with the laid down laws. In support, the Court has been referred to **Section 317 of the** **Companies Act** (7) which provides that:-

**“After the commencement of the winding up, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may direct.”**

It was pointed out that, this provision clearly demonstrates the Special Status that is accorded to a company that is wound-up regarding legal suits.

It was further pointed out that, this Court has on numerous occasions pronounced itself on the purpose of **Section 317 of the** **Companies Act**. (7) One such occasion is in the case of ***CREDIT AFRICA BANK LIMITED (In Liquidation) -Vs- ELIAS NAMO KUNDIONDA***. (1)

It was further, submitted that, in the circumstances of this case, the appellant wanted to obtain an undue advantage over other creditors by these proceedings, an act that the Supreme Court has frowned upon.

Finally, it was submitted that, this appeal has no merit and must be dismissed with costs. Commenting on the appellant’s heads of argument and authorities, Mr. Chizu submitted that, the authorities in ground two suggested that the case was not decided on merits, when the case was decided on merits.

We have considered, the grounds of appeal, and the heads of arguments filed on behalf of the parties; and we have examined the judgment of the Court below that has been appealed against.

In relation to ground one, we have examined the evidence that was adduced before the Court below, and we have found that it was common to both parties that the respondent was placed on compulsory liquidation by the Bank of Zambia.

Since the respondent was placed under compulsory liquidation, the provisions of part four of the **Banking and Financial** **Services Act, Chapter 87 of the Laws of Zambia** were evoked. The provisions include **Section 84D**,which restricts payment or transfer of an asset or property of the Bank or financial institution; **Section 101** which provide for filing of objection; **Section 104** which provide for filing of claims; **Section 105** which provides for limitation of filing of claims, preparation and filing with the Court of a schedule of the step it proposes to take or liquidation schedule; and **Section 107** which provide for priority of creditors.

The fact that the appellant’s claim was known to the respondent and was under discussion is not material.

The claim was caught up by the resolution by the Board of the Bank of Zambia. **Section 84D** restricts payment or transfer of the assets of a Bank or financial institution once the Bank of Zambia takes possession of such institution. From the date and time the respondent was taken into possession, the appellant was by law required to follow the procedure provided by the Act.

The Court below, cannot therefore, be faulted for holding as it did. We therefore find no merit in ground one of appeal. It is, accordingly, dismissed.

In relation to ground two of appeal, we have considered the arguments in support and in response of the said ground; and we have examined the judgment of the Court below.

The Court below having found on the undisputed evidence that the respondent was placed under compulsory liquidation, it cannot be faulted for holding as it did that **Section 107** provides for priority by which the creditors should be paid and that the appellant’s action to enforce the claim in Court was premature.

There was no evidence that the appellant had complied with the procedure that is, whether he had filed his claim etc. Therefore, his claim was premature. In the circumstances, we find no merit in ground two of appeal. It is also dismissed.

In the light of the foregoing, we find no merit in the appeal which is dismissed with costs to the respondent, to be taxed in default of agreement.

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M. S. Mwanamwambwa,

**SUPREME COURT JUDGE**

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M. E. Wanki, P. Musonda,

**SUPREME COURT JUDGE SUPREME COURT JUDGE**