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THE SUPREME COURT OF ZAMBIA | **APPEAL NO. 117/2008**

HOLDEN AT LUSAKA | **SCZ/8/128/2008**

(Civil Jurisdiction)

BETWEEN:

ITUNA PARTNERS — **APPELLANT**

AND

ZAMBIAN OPEN UNIVERSITY LIMITED — **RESPONDENT**

CORAM: Sakala, C.J, Chibesakunda, Mwanamwambwa, J.J.S.

On the 22nd July, 2010 and 16th June 2014.

For the Appellant: Mr. K. Musabandesu, of Messrs M and M Advocates.

For the Respondent: Mrs. Chiyengi of CC Mwansa and Associates.

JUDGMENT

Mwanamwambwa, JS, delivered the Judgment of the Court.

Cases referred to:

1. **DPP V. Jack Lwenga (1983) Z.R. 37.**
2. **R. V. Essex Justices (1982) 3 ALL ER, 926.**
3. **Attorney General V. James and Others (1962) 1 ALL ER, 255.**
4. **Film Lab Systems International Ltd V. Pennington (1994) 4 ALL ER 673.**

Legislation referred to:

1. **High Court Rules, CAP 27 of the Laws of Zambia, Order 39 Rule 1.**
2. **High Court Rules, CAP 27 of the Laws of Zambia, Order 40 Rule 6.**
3. **Rules of the Supreme Court, 1999 Edition, Order 62/11/8.**

When we heard this Appeal, Hon. Mr. Justice E.L. Sakala was part of the Court. He has since retired. Therefore, this Judgment is by the majority.

This is an Appeal against the Ruling of the High Court, dated 28th April, 2008. By that Ruling, the Learned trial Judge ordered that costs of the proceedings in an action, be borne by the Advocates who instituted the action, the Appellant in this case.

The brief facts of the matter are these: on the 20th of June, 2007, the Plaintiff, now the Respondent herein, instituted an action in the High Court against the Defendants, Mary Grace Nkole and 12 others, for:

1. **An order nullifying the meetings called by minority shareholders of the Plaintiff Company on the 15th May and 2nd June, 2007 as well as the resolutions passed thereat;**
2. **Injunction restraining the Defendants and/or their agents and servants from interfering with the duties of the Directors and violating the Articles of Association of the Plaintiff Company in any manner or form;**
3. **Order cancelling entries made at the Patents and Companies Registration Office at Lusaka on 11th June, 2007 relating to resolutions passed at the purported meetings of 15th May and 2nd June, 2007;**
4. **Damages for breach of the Articles of Association; and**
5. **Costs.**

Before the matter could proceed to trial, Counsel for the Defendants filed a Notice of Intention to Raise Preliminary Issues pursuant to Order 33 Rule 7, of the Rules of the Supreme Court, 1999 Edition. The Preliminary Issues raised were:

1. **That the Writ of Summons issued herein be set aside on the ground that the same was issued without the resolution of the Company authorizing the appointment of Ituna Partners as Advocates for the Plaintiff and issuance of the Writ of Summons; and**
2. **Whether the other shareholders are entitled to sue in the Company name without a Company Resolution to that effect.**

On the 27th of July, 2007, the Learned trial Judge delivered a Ruling in favour of the Defendants. She was of the view that the preliminary issues raised by the Defendants were valid. She stated that although this action was brought in the Company's name, the issues raised were between the majority shareholders of the company and it's Minority shareholders. That there was, therefore, need for a resolution of the Company to authorize commencement of this action in the name of the Company. She observed that exhibit **"EC2"** to the affidavit in reply, did not authorize the commencement of this action in the Company's name. And that it never instructed Ituna Partners to act for the Plaintiff Company in this matter. That the exhibit in question stated that Ituna Partners were instructed to act for the Plaintiff in the impending civil suit by Professor Dickson Mwansa, the Plaintiff's former Vice Chancellor, for termination of his services. On the authorities cited, the learned trial Judge, found that the mere fact that the people who

commenced action, were the majority shareholders, founding members and Directors of the Company, did not mean that they did not require such a resolution of the Board. She added that no shareholder of a Company could bring an action in the name of the Company, without a resolution of the Board of Directors of the Company. She held that the action was irregularly commenced. Therefore, it was an abuse of the Court process. Accordingly, she awarded costs to the Defendants, to be taxed in default of agreement.

On the 3rd of December, 2007, the Plaintiff, Respondent herein, paid the costs of K20 million (old currency) to the Advocates of the Defendants in the Court below, Mary Grace Nkole and 12 others. On the 14th of December, 2007, the Plaintiff, now Respondent, filed an application for an order that the costs of the proceedings in the action, be borne by the Advocates who instituted the action, Messrs Ituna Partners. The supporting affidavit stated that the Plaintiff in the lower Court, was joined to the action without its authority and that it did not instruct Messrs Ituna Partners, to institute the action or to represent it. That it would be unfair for the Plaintiff to incur legal costs of the action. That in the circumstances, the costs should be borne by the Advocates, Messrs Ituna Partners, for instituting the action without authority.

On the 24th of January, 2008, the Defendants, in the Court below, Mary Grace Nkole and 12 others, filed a Notice of Intention

to Raise Preliminary Issues pursuant to Order 33 Rule 7 of the RSC, 1999. The Preliminary Issues were:

1. **Whether it is proper for the Plaintiff to apply for an order as to costs in this matter when the action had been dismissed by the Court; and**

2. **Whether it is not an abuse of the Court process for the Plaintiff to seek orders for stay and costs when the costs subject to the action had already been paid by agreement.**

In her Ruling dated 28th April, 2008, the Learned trial Judge found that the Plaintiff Company was entitled to recover the sum of K20million from Ituna Partners, on the ground that the Plaintiff Company had been made to incur the costs of this litigation, when it never authorized the Law Firm to commence this action in the Company's name. She reiterated that Ituna Partners were appointed only to represent the Plaintiff Company in the matter against it by Professor Dickson Mwansa. That Counsel who had commenced this action in the name of the Company, without authority, should bear the costs of the proceedings. She added that the Plaintiff's application on costs was on firm ground, as the Court did not rule on the question as to who should bear the costs of this action, as between the Plaintiff and Ituna Partners. that the Court had not become **functus officio** on costs, as suggested by Dr Mulwila of Ituna Partners.

Unhappy with the ruling, Ituna Partners have appealed to this Court. There is one ground of appeal. It states:

> "That the Learned trial Judge misdirected herself in law when, subsequent to her Ruling delivered on the 27th July, 2007, in which the Respondent's action in the Court below was dismissed with costs against the Respondent, the Learned trial Judge in a Ruling delivered on 28th April, 2008, reversed the Order on costs against the Respondent and instead, ordered the Appellant to bear the costs of the dismissed action, on the basis of an application filed by the Respondent, under Order 40 Rule 6 of the High Court Rules, as read together with Order 62/11/8 of the Supreme Court Practice Rules of England, 1997 Edition."

When the Appeal came up for hearing, Counsel for both parties relied on their filed Heads of Argument.

On behalf of the Appellant, Counsel submits that from the Ruling of the Learned trial Judge, it is clear that the party that is to bear the costs of the dismissed action was the Respondent and not the Appellant, which was not even a party to the proceedings in the lower Court. That what is clear is that leave to appeal was granted to the parties if any of them was dissatisfied with the Ruling. That having dismissed the action, the Court became **functus officio** and had no jurisdiction and/or power to deal with the matter anymore. Counsel cited the case of **DPP V. Jack Lwenga (1),** and referred to a passage from that case where the Court stated:

> "but my difficulty in this Appeal was compounded by the fact that in coming to make the order, I used the word "dismissed". I told the Learned Senior State Advocate that by the use of the word "dismissed", I excluded myself from reopening the Appeal because I was now functus officio."

He added that it is trite Law that the moment a Court announces its decision, however inconvenient the result maybe, it becomes **functus officio**. He cited the cases of **R. V. Essex Justices (2)** and **Attorney General V. James and Others (3)**

He added that the only way the Court below could have had jurisdiction to deal with the matter any further, was if any of the litigants had brought an application for review under **Order 39, Rule 1 of the High Court Rules, CAP 27 of the Laws of Zambia**. That under **Order 40, Rule 6 of the High Court Rules** and **Order 62/11/8, of the Rules of the Supreme Court, 1999,** the Court has no jurisdiction to vary its earlier Ruling made on the 27th of July, 2007, on the aspect of costs in which the Court had already condemned the Respondent to bear the costs of the dismissed proceedings.

In response, Counsel for the Respondent submitted that the contention by the Appellant is misconceived. That the authorities cited in support are misplaced because the application in issue was not for variation or reversal of the earlier order of the Court below, made in its Ruling of 27th July, 2007. That the nature of the relief that was sought by the Respondent was a wasted costs order against Counsel, to compensate for costs which the Respondent had incurred as a result of the Advocates improper conduct, of commencing the law suit in the Respondents name and on its behalf without the Respondents authority. That a wasted costs order is best left until after the end of trial. The case of **Film Lab Systems International Ltd V. Pennington (4)** was cited in this regard.

She added that the jurisdiction and discretion of the Court is also implied within the wide discretion conferred by the language of

Order 40, Rule 6 of the High Court Rules, CAP 27. That the power is explicitly conferred on the Court by the provisions of Order 62 Rule 11, which gives the Court discretion in a proper case, to order that legal counsel who by his/her improper conduct, has caused a party to incur costs, should bear the whole or a specified sum of the costs so incurred. That it is a misconception that the order in question, could not be properly granted except on review or appeal. That the rule against any further steps being taken in a dismissed action relates to matters in the cause.

We have considered the submissions on both sides and have looked at the authorities cited. From the evidence on record, it is clear that there was no resolution from the Board of the Respondent, allowing Ituna Partners to commence legal proceedings on behalf of the Respondent. The issue of the Board resolution is not in dispute. What is in dispute is the issue of costs.

Order 40, Rule 6 of the High Court Rules provides that:

> **"the cost of every suit or matter and of each particular proceeding therein shall be in the discretion of the Court or a Judge; and the Court or a Judge shall have full power to award and apportion costs, in any manner it or he may deem just, and, in the absence of any express direction by the Court or a Judge, costs shall abide the event of the suit or proceeding.**
>
> **Provided that the Court shall not order the successful party in a suit to pay to the unsuccessful party the costs of the whole suit; although the Court may order the successful party, notwithstanding his success in the suit, to pay the costs of any particular proceeding therein."**

Order 62/11/8 of the Rules of the Supreme Court of England, 1999 Edition provides that:

> **"where proceedings are instituted without authority an order for the solicitor to pay the costs personally is within the discretion of the Court."**

It is clear from the above that costs are in the discretion of the Court. This discretion should be exercised impartially and fairly. The Appellant instituted an action on behalf of the Respondent without instructions from the Respondent. The Respondent suffered costs as a result of the Appellant's action. We find that it is illogical for any person at law, to suffer loss for an action which they did not authorize. This situation falls under the circumstances envisaged by **Order 62/11/8 of the Rules of the Supreme Court, 1999**. It would be extremely unfair and setting a bad precedence if Counsel would, on his or her own volition commence legal proceedings in the name of a person without that person's instructions. An Advocate can only institute legal proceedings on behalf of a person after obtaining instructions from that person. We find that the Learned trial Judge exercised her discretion justly and fairly when she condemned the Appellant to pay the costs of the irregularly commenced proceedings.

The other part of the Appellant's contention was that the Court was **functus officio** after delivering the Ruling of the 27th July, 2007. In that Ruling, the Court stated:

> **"I therefore, agree that this action has been irregularly brought and that it is therefore, an abuse of the court process. The same is dismissed with costs to the Defendants. The same are to be agreed and in default of such agreement, to be referred to taxation."**

The Appellant cited a passage from the case of **DPP V. Jack Lwenga** cited above, in support of its argument.

In that case, an accused person was acquitted by the Court of the Resident Magistrate at no case to answer stage. After the acquittal, the Court awarded costs against the State and ordered that the costs be paid to the accused person from public revenue. The Director of Public Prosecutions appealed against that decision of awarding costs against the State. On June 18, 1982, the Senior State Advocate was to argue the Appeal. On August 18, 1982, a State Advocate attended to this appeal.

On August 28, the court marshal informed the court that he had received a note from Messrs Cave Malik and Co. representing the respondent in which they were asking for an adjournment to another date. On hearing this, the State Advocate said:

"In any case the State was making an application to abandon the appeal."

The State Advocate gave reasons for the stand he took and said that there was no evidence proving that the accused committed the offence. On the State's application to abandon the appeal, the Court then said:

"The State has given its reason for abandoning this appeal, the appeal is therefore abandoned and the appeal is dismissed."

Five months later, the State went back to court with an ex-parte summons to restore the appeal. The application was argued

by the Senior State Advocate. His main contention was that the abandonment of the appeal by the State Advocate was wrong because the abandonment of the appeal related to the acquittal of the accused on the whole evidence and not an appeal against order for costs against the State. Then the Court stated the following:

> "But my difficulty in this appeal was compounded by the fact that in coming to make the order, I used the word "dismissed." I told the learned Senior State Advocate that by the use of the word 'dismissed' I excluded myself from reopening the appeal because I was now functus officio. Knowing fully well that the appeal by the State if argued would succeed with the abundance of authorities against the decision made by the learned Resident Magistrate; I referred the matter to the Supreme Court to undo my decision. I had in so doing in fact overlooked the importance of that Court's decision in The People v Sikatana. The case record was sent back to me and the Supreme Court advised me to determine the application as presented to me. The problem presented by the application by the State is made much more difficult because in the High Court Rules, there is no relevant rule dealing with abandoned appeals. In the Supreme Court, such a provision is there, Rule thirty-three of the Supreme Court Rules, Cap. 52...I have browsed in nearly every law report in our Zambian reports, and I have found no decision on this point. It is a unique situation, I find myself in. It is common knowledge that English decisions are not binding on me but are of greater persuasion. I have talked of my being functus officio and the axiom res judicata pro veritate accipitur at the same time, I should also borrow the wise words from the 1976 Criminal Law Review...The interests of justice are not always necessarily synonymous with the interests of the accused person. A judge's task is to hold the scales of justice impartially and to see that justice is done evenly and impartially between the State and the accused person. It therefore, behooves me to say that although I dismissed this appeal, the abandonment of the appeal against the award of costs was made under fundamental mistake that the appeal was against acquittal as opposed to an award of costs; justice will be seen to be done to both parties if I restored the appeal. The appeal is hereby restored."

From the above, we find that the quotation by Counsel was 'obiter' and not the holding of the Court. The Appellant misapplied the case and the principle behind it. We therefore, find its application misplaced.

Functus – officio is a Latin phrase. At page 743 of **Black's Law Dictionary, 9th Edition (2009)** the phrase is defined as follows:

> **(Latin *"having performed his or her office"* (*"of an officer or official body"*) *without further authority or legal competency because the duties and functions of the original Commission have been fully accomplished*."**

From the above definition a Court becomes **functus officio** when all the substantive issues in the cause are determined by it. If such matters are not determined by the Court, like in the **Jack Lwenga** case, then the Court is not **functus officio.** In the instant case, the lower Court did not rule on the issue as to who should bear the cost, between the Respondent and the Advocates. Therefore, we do not accept the argument that the lower Court was **functus officio** on the issue costs.

This is definitely not a matter that should be dealt with by way of review or an appeal. The legal principle governing review is well settled. **For review under Order 39, Rule 2 of the High Court Rules to be available, the party seeking it must show that it has discovered fresh material evidence, which would have had material effect upon the decision of the Court and have been discovered since the decision, but could not, with reasonable**

diligence, have been discovered before: See **Roy vs Chitakata Ranching Company Limited** 1980 Z.R. 198. This condition is not present in this case. Hence review is not available. This matter could not be considered by way of appeal because there was nothing wrong with the first ruling of the learned trial Judge.

We therefore, find no merit with this Appeal. We dismiss it, with costs to the Respondent. These shall be taxed in default of agreement.

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E. L. Sakala
CHIEF JUSTICE (Rtd)

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L. P. Chibesakunda
AG/ CHIEF JUSTICE

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M. S. Mwanamwambwa
AG/ DEPUTY CHIEF JUSTICE