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

APPEAL NO. 032/2012
SCZ/8/26/2012

BETWEEN:

PATRICK MAKUMBI & 25 OTHERS	**APPELLANT**
AND	
GREYTOWN BREWERIES LIMITED	**1ST RESPONDENT**
CHARLES KAPEMBWA SIPANJE	**2ND RESPONDENT**
MARTIN MUTONDO	**3RD RESPONDENT**
NAMBAYO KALALUKA	**4TH RESPONDENT**

Coram: **Wanki, Muyovwe and Malila, JJS**

on 3rd February, 2015 and 15th May, 2015

For the Appellant:	Mr. K.I. Mulenga of Messrs. Kumasonde Chambers
For the 1st and 2nd Respondents:	No appearance: Messrs. Douglas & Partners
For the 3rd and 4th Respondents:	Mr. B. Gondwe of Messrs. Buta Gondwe & Associates

---

JUDGMENT

Malila, JS, delivered the Judgment of the court.

Cases referred to:-

1. *Magnum (Zambia) Limited v. Basi Quadri (Receiver/Manager) and Grindlays Bank International Limited (1981) ZR 141*
2. *Avalon Motors Limited (In receivership) v. Benard Leigh Gadsden and Motor City (1998) ZR 41*
3. *Wilson Masauso Zulu v. Avondale Housing Project (1982) ZR 172*
4. *Zambia Revenue Authority v. Jayesh Shah (2001) ZR 60*

5. *Mundanda v. Mulwani (1977) ZR 29*
6. *Zambia Bata Shoe Co. Ltd. v. Vin-Mass Limited, SCZ Judgment No. 4 of 1994*
7. *Zambian Airways v. Musengule, SCZ Judgment No. 14 of 2008*
8. *Augustine Kapembwa v. Danny Maimbolwa and the Attorney General (1981) ZR 127*
9. *Leonard Investment Company Limited v. Joan Irwin, SCZ/8/222/2003*
10. *Nkata and Others v. Attorney General, (1966) ZR 124*
11. *Zambia Revenue Authority v. Dorothy Mwanza and Others (2010) ZR Volume 2, 181*
12. *Simwanza Namposya v. Zambia State Insurance Corporation Limited (2010) ZR Volume 2, 339*
13. *Attorney General v. Kakoma (1975) ZR 216*
14. *Jameson Mundomwe Hapeeza v. Zambia Oxygen Limited (1988-1989) ZR 202*

Other authorities referred to:

1. *The Companies Act, chapter 38 of the laws of Zambia*
2. *Section 26 B 2(a) and (b) of the Employment Act, chapter 268 of the laws of Zambia*
3. *Black's Law Dictionary, 8th Edition*

This appeal was provoked by the Ruling of the Industrial Relations Court given on the 10th of January, 2012 in which the court sustained the 3rd and 4th respondent's claim to goods seized in execution process issued at the instance of the appellants, former employees of the second respondent.

Glossing over some subtleties, the background facts giving rise to the dispute now before us can be summarized as follows. The first respondent was a limited company whose Managing Director

was the second respondent. Luqi Packaging Limited, was a limited company with a separate existence though, according to the 2nd respondent, it was a sister company to the 1st respondent. Sometime in 2005, the Directors of the 1st respondent passed a resolution authorizing the company to avail its land, buildings, plant and equipment to Luqi Packaging Limited to use as collateral for a loan facility, which the latter arranged from the Zambia National Commercial Bank Limited (ZANACO). A third party mortgage and a floating and fixed debenture in favour of ZANACO were subsequently registered.

By a deed of appointment of receiver/manager dated the 6th of April, 2009, the 3rd and 4th respondents were appointed by ZANACO as Joint Receiver/Managers of Luqi Packaging Limited.

Employees of the 1st respondent had commenced proceedings against the 1st and 2nd respondents in the Industrial Relations Court. Sequel to an Industrial Relations Court judgment in favor of the appellant, a writ of *fieri facias* was issued on 24th August, 2010, against the 1st and 2nd respondents. The Sheriff of Zambia and his bailiffs attended to execution of that writ of *fieri facias* at the 1st respondent's place of business, namely, Stand No. 10433, Chinika,

Lusaka. Walking possession was taken of certain assets duly listed in the Sheriff's seizure farm.

On 30th August, 2010, the Sheriff of Zambia was served with a notice of claim by the 3rd and 4th respondents, as claimants of the seized assets. This prompted the Sheriff to file inter-pleader summons into the Industrial Relations Court. In a short affidavit in support of the inter-pleader summons on behalf of the Sheriff, the Industrial Relations Court was beseeched to determine whether the claimants were the owners of the goods. It was averred that the Sheriff of Zambia had no claim or interest in the goods seized, other than for charges and costs of levying execution.

The Industrial Relations Court, after hearing the parties' witnesses and considering documentary evidence and the submissions of the parties, came to the conclusion that the claimant's claim to the seized goods was meritorious. It ordered the return of the goods to the claimant and that the Sheriff's costs for the execution process be borne by the 1st and the 2nd respondents. It is against this ruling that the present appeal was launched.

Four grounds of appeal contained in the memorandum of appeal were formulated as follows:

"**Ground One**

That the Industrial Relations court erred in both law and fact when it held that *we have carefully considered the evidence on record and the submissions of both counsel for the Claimants and the complainants and we are of the view that the claimants are entitled to the assets seized in execution of the writ of fifa issued by the complainants.*

Ground Two

That the Industrial Relations Court erred in both law and fact when it held that *we are fortified in saying so because, whereas we agree that the transfer of the 1st respondent's assets to Luqi Packaging Limited to be used as collateral for the credit facility obtained from ZANACO Plc., was irregularly done, the same did not invalidate the transaction because section 142 (2) of the Companies Act, Cap. 388 of the laws of Zambia states:*

> **'(2) the proceedings of a meeting shall not be invalidated by reason only if-**
>
> **(a) the accidental omission to give notice of a meeting to persons entitled to receive notice;**
>
> **or**
>
> **(b) the none receipt of a meeting duly sent to such a person.'**

Ground Three

That the Industrial Relations Court erred both in law and fact when it held that *furthermore, section 158 (4) of the same Act provides for penal sanctions only for failure to comply with registration of copies of special resolutions as required by subsection (1) of the same section.*

Ground Four

That the Industrial Relations court exhibited its biasness towards the complainant when it refused the complainant's application to have the proceeds of the sale of the assets in issue in the sum of K460 million to be paid into court pending determination of the appeal."

At the hearing of this appeal on 3rd February, 2015, Mr. Mulenga, learned counsel for the appellant, indicated that he would place reliance on the written heads of argument filed in court. His learned counter-part for the 3rd and 4th respondent, Mr. Gondwe, equally informed us that he relied on the heads of argument filed on behalf of the 3rd and 4th respondents. Although Messrs. Douglas and Partners are on record representing the 1st and 2nd respondents, they made no appearance. Upon confirmation by the Court Clerk that the notice of hearing was served on Messrs. Douglas and Partners on 17th February, 2015, we decided to proceed in the absence of representation for the 1st and 2nd respondents.

We pause here to make an observation on the grounds of appeal as formulated by the learned counsel for the appellant. With the greatest respect to the efforts that have been invested in styling these grounds of appeal, we think, on the whole, that the grounds could have been drafted more elegantly with greater precision and more adherence to a measured approach that would easily identify the appellant's grievance. As drafted, the grounds are somewhat

vague, so that we would have inevitably to rely on the heads of argument to fully appreciate what it is that has aggrieved the appellants.

An issue that is in all respects *ultra petita*, but is nonetheless of no little importance, relates to the parties to this action. The 3rd and 4th respondents in this appeal, are the receiver/managers of Luqi Packaging Limited appointed under a deed of debenture by ZANACO over the assets of the Luqi Packaging Limited. Section 113(1) of the **Companies Act, chapter 388**[1] of the laws of Zambia provides that:

> **"A receiver of any property or undertaking of a company appointed, otherwise than by a court, under a power contained in any instrument shall, subject to section one hundred and fourteen, be deemed in relation to the property or undertaking to be an agent and officer of the company and not an agent of the person by or on behalf of whom he is appointed, and shall act in accordance with the instrument under which he is appointed and with any direction of the court made under this section."**

As was stated by the High Court in **Magnum (Zambia) Limited v. Basi Quadri (Receiver/ Manager) and Grindlays Bank International Zambia Limited**[1] and upheld by us in **Avalon Motors Limited (In receivership) v. Benard Leigh Gadsden and Motor City**[2], a company under receivership has no *locus standi*

independent of its receiver. We believe that the receiver too, has no interest, independent of the company to maintain an action on behalf of the company. The converse is equally true. A receiver cannot be sued independently of the company for which he is appointed. Section 115 (1) of the Companies Act provides that:

> **"where a receiver of any property or undertaking of a company has been appointed, every invoice, order or business letter issued by or on behalf of the company, the receiver or the liquidator, being a document on which the name of the company appears, shall contain a statement that a receiver has been appointed."**

The 3rd and 4th respondents could only be sued in their capacities as receiver/managers. We are of the view that Luqi Packaging Limited in receivership, should have been reflected as a party to this action. This, however, is not an issue that was canvassed by the parties in the lower court or here and we are not inclined to belabour it.

In his written heads of argument on ground one, Mr. Mulenga argued that there was no evidence put forward before the court by the respondents to support the finding made by the court below that the 3rd and 4th respondents were entitled to the assets seized in the execution of the writ of *fifa* issued by the appellant. The learned counsel took us through the evidence of the witnesses as recoded

by the lower court, and posited that there was no explanation preferred regarding the relationship between Luqi Packaging Limited and the 1st respondent. We understand the thrust of Mr. Mulenga's argument on this ground to be that there was no relationship between the said companies to justify the use of property belonging to the 1st respondent as collateral for a facility extended to Luqi Packaging Limited by ZANACO.

In his brief response on this ground, Mr. Gondwe defended the holding of the lower court. He maintained that the 1st respondent did regularly transfer its assets to Luqi Packaging Limited for purposes of providing security. In his view, there was nothing in the findings of the lower court which can be said to be a perverse finding of fact to warrant this court to set aside the judgment. The learned counsel relied in this regard, on the case of **Wilson Masauso Zulu v. Avondale Housing Project**[3].

Under ground two, the learned counsel for the appellant took issue with the lower court's position that although the transfer of the 1st respondent's assets to Luqi Packaging Limited to facilitate the provision of collateral was irregularly done, the transaction was not thereby invalidated. The learned counsel adverted to **section**

158(1) of **the Companies Act,** chapter 388 of the laws of Zambia which requires that a certified copy of every special resolution made by a company or by a class of members of a company must be lodged with the Registrar within fifteen days of its passage. The evidence on record was that the resolution transferring the assets of the 1st respondent to Luqi Packaging Limited was never lodged with the Registrar. The learned counsel pointed out that the word used in section 158(1) is "shall" which according to **Black's Law Dictionary**[3], entails a duty to, or required to, and is the mandatory sense that the drafters typically uphold. According to the learned counsel, failure to lodge the special resolution is, therefore, fatal. He cited the case of **Zambia Revenue Authority v. Jayesh Shah**[4] in which we stated that it was always desirable that cases are decided on their substance and merit, and that the effect of a breach will not always be fatal if the rule is merely regulatory or directory. The learned counsel implored us to distinguish the facts here from those in the **Shah case**[4] and hold that the transfer of the assets of the first respondent to Luqi Packaging Limited was irregular, and fatally so.

In rebutting the arguments on ground two, Mr. Gondwe repeated the arguments he made under ground one. He submitted that the court below correctly applied **section 142(2)** of the **Companies Act**, which provides that:

> **"142 (2) The proceedings of a meeting shall not be invalidated by reason only of –**
>
> **(a) the accidental omission to give notice of a meeting to a person entitled to receive notice, or**
>
> **(b) the none receipt of notice of a meeting duly sent to such a person."**

The learned counsel referred us to the case of **Mundanda v. Mulwani**[5], where we stressed that parties to a contract should be presumed to contemplate a legal rather than an illegal course of proceedings. Counsel further submitted that when certain persons are allowed by the company to represent it, is not for the company to confirm the authority of such appoint but the party dealing with such representatives will be obliged to confirm their authority or appointment. The case of **Zambia Bata Shoe Co. Ltd. v. Vin-Mass Limited**[6], was cited.

Under ground three, the appellant's counsel faulted the lower court in determining that **section 158(4)** of the **Companies Act,**

provides for penal sanctions for failure to comply with registration requirements of copies of special resolutions. We must state that we see this ground as an extension of ground two. We shall therefore deal with this ground and ground two together.

In his brief argument, which was elliptical, in our view, Mr. Mulenga submitted that section 158(1) "is not dependent on the provisions of section 158(4)." Citing no authority whatsoever, he submitted that the provisions of section 154(4) had no relevance to the issues raised in this case as that section empowers relevant arms of government to enforce the penal provisions, which function is not for the appellants to perform.

In retort, Mr. Gondwe, submitted that failure to comply with a statutory provision in an Act of Parliament which does not nullify the act, agreement and, or proceeding but charges the defaulter with a penalty, does not nullify such an act or proceeding. The learned counsel referred us to the case of **Zambia Airways v. Musengule**[7].

Ground four alleged bias on the part of the lower court in refusing the appellant's application that the proceeds of the sale of

the assets subject of these proceedings in the sum of K460 million be paid into court pending the determination of the appeal. The court declined to grant the appellant's application to have the proceeds of the sale of the assets paid into court principally because those proceeds had gone to off-set the loan obtained by Luqi Packaging Limited, for which the assets were pledged as security.

According to the learned counsel for the appellants, the court should have allowed the appellants' application given the fact that it had found as a fact, that the transfer of the 1st respondent's assets to Luqi Packaging Limited was irregular. Because of this, Luqi Packaging Limited did not acquire a beneficial interest in the assets.

The learned counsel for the appellants repeated the submission that the evidence of the witnesses which the court below accepted was not credible and in some cases, witnesses gave conflicting evidence. Relying on the case of **Augustine Kapembwa v. Danny Maimbolwa and the Attorney General**[8], the learned counsel submitted that the findings of fact by the lower court should be set aside for being in conflict with the principles we set out in that case.

Mr. Gondwe made a very brief response to the arguments submitted by the appellants' counsel on this ground. He repeated the arguments made on behalf of the 3rd and 4th respondents in the court below. He called in aid the decision of this court in **Leonard Investment Company Limited v. Joan Irwin**[9], where we stated that an order of stay of execution cannot be given when the subject matter intended to be preserved has already been alienated.

We have carefully examined the record of appeal, in particular, the evidence tendered before the lower court. We have also considered the rival arguments advanced by counsel for the parties. What appears obvious to us, is that under ground one, the learned counsel for the appellants seeks to assail findings of fact and not law. According to Mr. Mulenga, the findings of the court were not in accord with the evidence submitted by the parties.

This court has consistently explained the position that we are loath to interfere with findings of fact of a lower court, save in very limited circumstances. In **Nkata and Others v. Attorney General**[10], we guided that:

> **"a trial judge sitting alone without a jury can only be reversed on questions of fact if (i) the judge erred in accepting evidence, or (ii) the judge erred in assessing and evaluating the evidence taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (iii) the judge did not take proper advantage of having seen and heard the witnesses, (iv) external evidence demonstrated that the judge erred in assessing the manner and demeanor of the witnesses."**

Similar sentiments were strongly carried in **William Masauso Zulu v. Avondale Housing Project Ltd**[3]. There, we stated that:

> **"before the court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that on a proper view of the evidence, no trial court acting correctly could reasonably make."**

We have reiterated the same principle in numerous other cases including **Zambia Revenue Authority v. Dorothy Mwanza and Others**[11] and **Simwanza Namposya v. Zambia State Insurance Corporation Limited**[12].

To succeed on ground one, therefore, it ought to be demonstrated that the court below made findings of fact which were perverse, or in the absence of relevant evidence, or upon a

misapprehension of facts, or that on a proper view of the evidence, no trial court acting correctly could reasonably make.

The gamut and premise of Mr. Mulenga's submission on this ground was that the evidence of the witnesses contradicted each other so that there was no credible evidence upon which the court would come to the conclusion that the 3rd and 4th respondents were entitled to the assets seized.

We are of the firm view that assessment of conflicting witnesses' evidence is in the province of the trial court; it does not belong here. As we stated in the case of **Attorney General v. Kakoma**[13],

> **"[a] court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard witnesses giving that evidence."**

In the present case, the lower court made its assessment of the conflicting evidence and made its preference in the judgment. Having stated the position as we have, therefore, we think, with utmost respect to the learned counsel for the appellant, that ground one is bereft of merit. It is dismissed accordingly.

Under ground two, we believe the question we have to determine is whether non-compliance by the 1st respondent with the provisions of **section 158(1)** of the **Companies Act**, chapter 388 of the laws of Zambia, invalidates the 1st appellant's transfer of its assets to Luqi Packaging Limited.

Section 158 (1) of the Companies Act provides as follows:

> **"A certified copy of every special resolution made by a company or by a class of members of a company, shall, within fifteen days after the making thereof, be lodged with the Registrar."**

The evidence before the lower court was that the resolution of the 1st respondent passed on 10th December, 2008 authorising the transfer of its assets to Luqi Packaging Limited was not lodged with the Registrar. According to the learned counsel for the appellant, non-compliance with the mandatory provisions of section 158(1) of the Act, made the transfer irregular and is fatal. We take it that the appellants counsel meant that failure to lodge the resolution with the Registrar within the period prescribed in section 158(1) invalidated the transfer of the assets from the 1st Appellant to Luqi Packaging Limited.

We have examined the said resolution. It is merely headed, "RESOLUTION OF THE BOARD OF DIRECTORS OF GREYTOWN BREWERIES LIMITED." The word 'special' does not appear anywhere in the resolution. It is thus unclear whether this resolution was an ordinary resolution or an extra ordinary resolution as defined in **section 156** of the **Companies Act**. What is clear, however, from our reading of section 158(1), is that only a special resolution requires to be lodged with the Registrar.

We have also perused the record of proceedings and especially the evidence of the various witnesses. None of the witnesses testified that the resolution to transfer the assets of the 1st respondent was passed as a special resolution, nor is there any evidence to suggest that a special resolution was required for the transfer of the 1st respondent's assets to Luqi Packaging Limited. In these circumstances, it seems to us that the relevant resolution passed in this case was an ordinary resolution, which as we have already stated, does not require to be lodged with the Registrar in accordance with section 158(1) of the Companies Act.

Even assuming that the resolution to transfer the assets of the 1st respondent was passed as a special resolution, failure to lodge such a resolution with the Registrar does not invalidate it or everything done pursuant to such resolution. As the lower court observed, under section 158(4) of the Companies Act:

> **"if a company fails to comply with subsection (1) [of section 154], the company, and each officer in default, shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding ten monetary units for each day that the failure continues."**

We reiterate what we stated in **Zambia Airways v. Musengule**[7], that a failure to comply with a provision in an Act of Parliament does not nullify the offending act or a particular agreement or proceeding, but only makes the defaulter liable to suffer the penalties prescribed in the Act. In that case, it was held that a breach of section **26 B 2(a) and (b)** of **the Employment Act**, chapter 268, did not render the redundancy null and void. Equally, in the case of **Jameson Mundomwe Hapeeza v. Zambia Oxygen Limited**[12], we held that failure to notify a proper officer after dismissing an employee as was required by **the Employment Act,** chapter 268 of the laws of Zambia, did not render the dismissal null

and void, but only gave rise to the penalty against the employer as prescribed under that Act.

Applying the two authorities to the facts of the present case therefore, we are of the firm view that failure to lodge a special resolution with the Registrar under section 158(1) does not invalidate the resolution itself or anything done under the authority thereof. Ground two and three have not the slightest merit, and are bound to fail.

Ground four attacks the lower court for what the appellant perceives as biasness toward the appellants when the court refused the appellants' application to have the proceeds of the sale of the assets paid into court. The main point taken by Mr. Mulenga on this ground is that since the lower court had made a finding of fact that the transfer of the 1st respondent's assets to Luqi packaging Limited was irregularly done, the court should have allowed the application to have the proceeds of sale paid into court pending the determination of the appeal.

We find this kind of inferential deduction imperceptive given what we have stated under grounds two and three.

We also note that ground four of the appeal was dealt with in the court's separate Ruling dated, the 24th of February, 2012. That Ruling is not the subject of the present appeal. It bears no emphasis that grounds of appeal can only relate to a portion of the decision being appealed against. There is no appeal against the Ruling of the 24th February, 2012. We are, therefore, unable to see the basis of the appellants' assault on the court's badge of neutrality in this case. We do not want to say that this ground of appeal is bogus, but we can say it has failed.

The net result is that the whole appeal is dismissed with costs for want of merit.

.....
M. E. Wanki
SUPREME COURT JUDGE

.....
E. C. Muyovwe
SUPREME COURT JUDGE

.....
M. Malila, SC
SUPREME COURT JUDGE