

IN THE SUPREME COURT OF ZAMBIA

APPEAL No.52/2016

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

STEPHEN MUKENA KONGWA

APPELLANT

AND

BANK OF ZAMBIA

RESPONDENT

CORAM: Hamaundu, Kabuka and Chinyama, JJS
On 26th May, 2016 and the 22nd August, 2016

For the Appellant : Messrs M.L. Mukande (Filed notice of non-appearance)
For the Respondent: Mr N. NChito, S.C., Messrs Nchito & Nchito

J U D G M E N T

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

King Farm Products Limited and Mwanamuto Investments Limited v Dipti Rani Sen
[2008] 2 ZR 72

Legislation referred to:

Banking and Financial Services Act, Chapter 387 of the Laws of Zambia

This is an appeal against a ruling of the Deputy Registrar by which the appellant's application for assessment of damages was dismissed on the ground, essentially, that the main judgment did

not require the assessment of what is due to the appellant on his accounts with the liquidated Credit Africa Bank.

The background to this appeal is thus:

The appellant is a retiree who used to maintain accounts with the now defunct Credit Africa Bank. In October 1997, the appellant received his retirement benefits, which he put in his accounts. About a month later, in November, 1997, Credit Africa Bank was closed. On the 6th March, 1998, the Bank of Zambia, the respondent herein, in exercise of its supervisory powers and duties under the **Banking and Financial Services Act, Chapter 387** of the **Laws of Zambia**, placed Credit Africa Bank under receivership; subsequently Credit African Bank was liquidated.

At that time the sum of money due to the appellant on his accounts stood at K37,080,143.49. Pursuant to the liquidation of the bank, the appellant was paid some monies as dividends. This reduced the balance on his accounts to K29,393,121.97. In October, 2001, the appellant sought the intervention of the Special Assistant to the President so that his monies could be released. The

latter took up the issue with the Secretary to the Treasury who, in turn, presented the issue to the Bank of Zambia. The Bank of Zambia responded that it had met its statutory obligations by paying the appellant the obligatory sum of K500,000 and, thereafter, two dividends.

In January, 2002, the appellant started communicating directly with the respondent, making several passionate pleas for the respondent to release his only life savings. To all those pleas, the respondent maintained the same response; that it had not realised sufficient funds from the loans and other assets of Credit Africa Bank to enable it make any further payments to creditors (depositors). In one of the responses, being a letter dated 18th December, 2002 the respondent went on to state that one of the creditors had obtained a court judgment against Credit African Bank, which judgment ordered that the creditor must be paid in full. The respondent further explained in that response that, as a result of that judgment, the respondent declared that creditor as a preferential creditor whose claim would rank in priority over other claims and that any funds that would be realised in future would

first be applied towards payment of the amount due to that creditor. The letter in which that response was made is of significance to this appeal, as will be seen later.

The appellant changed his approach. He wrote back to the respondent, pointing out that the respondent's Liquidation Manager was guilty of the following omissions: Firstly, that he failed to send to the appellant, soon after the decision to liquidate the bank was made, a statement of the status of the appellant's account; Secondly, that he failed to inform the appellant by way of the same statement of account that he was required to file a claim for the amounts on his accounts within a specified period. The appellant charged that those omissions were in breach of **Section 104(3)(b) and 104(4)** respectively of the **Banking and Financial Services Act**. The appellant also charged that, as a result of those omissions, his position as a creditor was relegated to that of an unsecured one. The appellant demanded that the respondent place him in the category of secured creditors and pay him immediately.

The respondent disagreed with the appellant's contention that the Liquidation Manager was negligent and maintained its position

that the appellant could only be paid when funds were realised from the assets of Credit Africa Bank.

The appellant instructed his advocates then, Messrs Ngenda Chambers, who wrote to the respondent, pursuing the appellant's contention that the Liquidation Manager was negligent.

Receiving no response to that letter, the appellant's advocates commenced this action. The substance of the action was founded on tort, namely; the alleged breach by the Liquidation Manager of those statutory provisions. In addition, the appellant contended that, according to the agreement that he had had with Credit Africa Bank on his fixed term deposits, there was to be interest thereon at 20% per annum which should have continued beyond the date of liquidation, but that the Liquidation Manager had not continued to apply that interest.

The respondent denied the negligence alleged. It also denied that the appellant was entitled to 20% interest per annum on his deposits; arguing that, if any interest was due at all, the rate would be in the respondent's sole discretion.

The trial court found that the Liquidation Manager did, indeed, not comply with some provisions of the **Act**, namely; **Sections 101(2), 104(3)(d) and 105**. The court, however, found that, the omissions notwithstanding, the appellant was not prejudiced and did not suffer any detriment because he had in fact been placed on the schedule of creditors and had even been paid some money. The court found that, as a creditor, the appellant belonged to the class of creditors ranked in **Section 107(1)(e)**. Consequently, the court held that it could not order that the appellant be paid his deposits immediately, and in full, unless all the other creditors in that class had been paid in full. In this case, the court found that the appellant had adduced no evidence to that effect and ordered that the appellant's claim should queue up together with those of the others in his class.

The trial court did not adjudicate on the appellant's claim that interest should have continued to be applied on his deposits at 20% per annum beyond the date of liquidation.

The appellant applied to the Deputy Registrar for assessment. What the appellant wanted to be assessed was the current balance,

after applying compound interest at 20% per annum over the years since the liquidation. That application was being made notwithstanding that the trial court had not adjudicated on that component of the appellant's action. In the application, the appellant brought to the attention of the Deputy Registrar a letter of the 18th September, 2002, which is the letter we referred to earlier, and, on the strength of that letter, argued that since the appellant now had in his possession a court judgment, he should be treated in the same manner as the creditor who had earlier obtained a court judgment and was paid in full.

The respondent's challenge to the application was two-pronged: Firstly, the respondent charged that the section which the trial court said the appellant belonged to did not exist; Secondly, the respondent objected to the appellants reliance on the letter of 18th December, 2002, arguing that the trial court had made a finding of fact that the appellant had not adduced evidence to show that other creditors in his class had been paid in full.

Dealing with the first part of the objection, the learned Deputy Registrar observed that there appeared to be a mere typographical

error in the citation of the relevant section and that this could be cured by an appropriate application to the trial court. The learned Deputy Registrar dismissed the second part of the objection because, in her view, the appellant was now in possession of a court judgment and, therefore, was entitled to be paid in the manner that the creditor mentioned in the letter of the 18th September, 2002 had been paid.

The appellant duly made an application before the trial court to correct the typographical error and it was corrected. The appellant then issued fresh summons for assessment.

The application for assessment was considered by a different Deputy Registrar who threw out the application entirely on the ground that, in his understanding of the judgment, the appellant was not entitled to full and immediate payment. The Deputy Registrar further pointed out that judgment did not direct that there be an assessment of the appellant's claim.

Dissatisfied with that ruling, the appellant has come before us with three grounds of appeal which we hereby set out as follows:

- (i) The Deputy Registrar misdirected himself both in fact and law when he held that the appellant could not be paid in full, plus interest
- (ii) The Deputy Registrar misdirected himself both in fact and law when he held that he had no direction to proceed to assessment
- (iii) The Deputy Registrar misdirected himself both in fact and law when he overruled the ruling of the previous Deputy Registrar who had directed the parties to proceed to assessment after correction of the error in the main judgment

The appellant filed a notice of non-attendance wherein he stated that he did not desire to be present at the hearing whether in person or by practitioner. Consequently, this appeal was argued entirely through the heads of arguments filed by both parties.

The appellant argued all the three grounds together. On behalf of the appellant, his advocates submitted that the trial court's judgment stated that the appellant belonged to the class stipulated in **Section 107(1)(e)** of the **Act** and directed that his claim be

treated in the same manner as the claims of the other depositors under the section. It was submitted that, armed with that judgment, the appellant applied for assessment because another preferred creditor in his class was paid in full. It was the appellant's argument that the first Deputy Registrar was on firm ground when she held the view that the appellant would be entitled to be paid in full in the like manner as the creditor mentioned in the letter of 18th September, 2002. The appellant submitted that, from that view, it was clear that the Deputy Registrar admitted the letter of the 18th September, 2002 as evidence that another preferred creditor in the same class as the appellant was paid, thus justifying the need for the appellant to be treated in a similar manner. The appellant argued that there was no appeal from that finding by the Deputy Registrar.

The appellant went on to submit that, having expressed that view, the first Deputy Registrar said that, once the appellant had corrected the error in the judgment, the assessment would proceed on the basis that the appellant was entitled to be paid in full.

The appellant, therefore, faulted the second Deputy Registrar for allowing the hearing on assessment but, nevertheless, dismissing the same on the ground that there was nothing in the main judgment that allowed for the appellant's claim to be assessed. The appellant argued that, by so doing, the second Deputy Registrar purported to overrule the decision of the first one when the two held equal jurisdiction.

Finally, the appellant argued that the trial court's judgment did not state that the appellant should only be paid if there were sufficient funds realised from proceeds but that it merely stated that the appellant should be treated in the same manner as those in his class. It was the appellant's argument that he had adduced evidence to show how one of those in his class had been treated.

Responding to the appellant's first ground of appeal, the respondent referred us to a portion in the trial court's judgment which states that payment in full depends on the availability of assets to meet the credits; and to a portion which states that the appellant's suggestion is erroneous and demonstrates a lack of understanding of liquidation rules. Counsel for the respondent

argued that, from those portions of the judgment, the second Deputy Registrar was on firm ground in his view that the judgment did not require assessment.

Responding to the second ground of appeal the respondent referred us to the case of **King Farm Products Limited and Mwanamuto Investments Limited v Dipti Rani Sen⁽¹⁾** where we held that:

“A Deputy Registrar cannot vary an order made by a judge whether in chambers or in open court” .

Relying on that holding, learned counsel submitted on behalf of the respondent that there was no order in the judgment which directed the assessment of interest by the Deputy Registrar. The respondent argued that the second Deputy Registrar was therefore on firm ground when he held that the judgment did not order assessment.

In the third ground, it was submitted that the first Deputy Registrar had no jurisdiction to order the parties to go to assessment as it was only the trial judge who could direct any sums

due to be assessed. Consequently, the second Deputy Registrar was correct to find that he could not proceed to make the award.

With those arguments, the respondent urged us to dismiss the appeal.

We have considered the arguments by the parties.

The cardinal issue to be resolved in this appeal is simply whether, either from the judgment or from the circumstances of the case as a whole, there arose a requirement that the appellant's claim be assessed.

To begin with, the appellant's contention appears to proceed on one major erroneous basis that the liquidator (in this case, the Bank of Zambia) is personally liable for a liquidated company's debts and must meet those debts from his personal resources. That is not correct. The correct position of the law is that which the trial court stated, namely; that the liquidated company's liabilities will be paid from funds realised from the sale of its assets. The liquidator's role in this case is to raise funds through such sale and pay to the creditors, starting with those that are ranked first in

priority. With that clarification, we immediately reject the appellant's argument that the trial court's judgment did not state that the appellant would only be paid when there were sufficient funds realised from the proceeds. As long as the judgment did not affirmatively state that the appellant be paid forthwith, the law provides that the appellant was to be paid only from funds realised from the sale of Credit Africa Bank's assets and, even then, only after those creditors who ranked superior to him had been paid.

The appellant seems to justify his demand for immediate payment by the argument that he stood in the same stead as another creditor who had in his possession a court judgment and was paid. Again, the appellant is proceeding on the assumption that that creditor and himself were in the same class. In liquidation, creditors are grouped in different classes. Some classes are superior in terms of priority over others. In this case, it was never established that that creditor was in the same class to which the appellant belonged. Most important, perhaps, is the nature of the order in the judgment which was in the possession of the other creditor. According to the letter of the 18th September, 2002, that

judgment ordered the immediate and full payment of that creditor's claim. The nature of the action which led to that judgment was not disclosed. Therefore, we are not in a position to know the reasons behind that judgment. However, there is a difference between that creditor's judgment and that of the appellant. The substantive part of the appellant's judgment stated that his claim was to queue up with those of others in his class. Therefore, even assuming that the appellant and the other creditor had been in the same class, they stood on different planes by virtue of the difference in the judgments which they were in possession of. Certainly the other creditor's judgment put him in a category that was superior to the appellant's. It cannot, therefore, be argued that since the appellant is in possession of a court judgment, he should be treated in the same manner as the other creditor.

We must also mention, although needlessly, that, in any event, the interest that the appellant wanted to assess was not adjudicated upon by the trial court.

In the circumstances, we hold that the second Deputy Registrar was on firm ground when he found that the judgment did

not give rise to any need for assessment. Consequently, we hold that the first Deputy Registrar was wrong in her view that because the appellant was in possession of a court judgment he stood on the same footing as the other creditor.

Coming to the third ground of appeal, we wish to say that when the assessment went before the second Deputy Registrar it was to be dealt with *de novo*. The second Deputy Registrar was free to look at it from his own point of view and exercise his independent legal mind thereon accordingly. He was not bound by any view or thought that the first Deputy Registrar had earlier expressed. Therefore, when the second Deputy Registrar's views differed from those expressed by the first one, he was not in any way overruling the first Deputy Registrar. As we have said, the assessment was being considered *de novo*; therefore everything in the assessment started and ended with the Deputy Registrar who finally heard and disposed of it, that is, the second Deputy Registrar.

That disposes of the third ground of appeal.

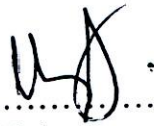
All in all, the appeal fails. We dismiss it with costs to the respondent.



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E. M. Hamaundu
SUPREME COURT JUDGE



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J. K. Kabuka
SUPREME COURT JUDGE



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J. Chinyama
SUPREME COURT JUDGE