

Registrar

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

2018/CAZ/8/126

BETWEEN:

FINSBURY INVESTMENTS LIMITED

APPELLANT

AND

ANTONIO VENTRIGLIA

1ST RESPONDENT

MANUELA VENTRIGLIA

2ND RESPONDENT



CORAM: KONDOLO, SIAVWAPA AND MAJULA JJA

ON 8th June 2018 and 27th July 2018

FOR HE APPELLANTS:

MR. J.P. SANGWA SC OF MESSRS
SIMEZA SANGWA & ASSOCIATES
WITH MR. J. CHIMANKATA AND D
CHAKOLEKA OF MESSRS
MULENGA MUNDASHI, &
KASONDE LEGAL PRACTITIONERS

FOR THE RESPONDENTS:

MR. S. SIKOTA SC WITH MISS C.
MWAMBAZI BOTH OF MESSRS
CENTRAL CHAMBERS, MR. S.
MAMBWE WITH MR. A SIWILA
BOTH OF MESSRS MAMBWE,
SIWILA & LISIMBA ADVOCATES
AND MR. C. SIANONDO OF
MESSRS MALAMBO & COMPANY.

J U D G M E N T

AUTHORITIES REFERRED TO:

CASES

1. *Ketchum International Plc v Group Public Relations Holdings Limited and Others*
2. *Suri and another v Royal Credit Limited*

STATUTES

1. *Court of Appeal Act No. 7 of 2016*

RULES

1. *Court of Appeal Rules 2016*
2. *Rules of the Supreme Court 1999 edition*

This is an appeal against the ruling of a single judge of this Court dated 31st May 2018 by which an application on behalf of the Appellant for an order of injunction was refused.

The genesis of the appeal is that by judgment dated 18th May 2018, the High Court made a declaratory order that the Respondents are the only shareholders in Zambezi Portland Cement Limited and further ordered the rectification of the Register to expunge the Appellant and Ital Terrazzo as shareholders in Zambezi Portland Cement limited.

Dissatisfied with the Judgment, the Appellant lodged an appeal to this Court and further sought to have the execution of the said Judgment stayed by the Court below pending appeal. The application for stay was accompanied by a certificate of urgency and it was filed on Monday the 21st May 2018.

The learned trial Judge was however, not available that day to attend to the application for stay and at 15:30 hours, the advocates for the Appellant learnt that the judgment of the Court below had been executed and the necessary changes had since been effected by PACRA. Further, on the same day the Appellant's advocates were advised that the learned trial Judge had set 24th May 2018 at 10:30 hours as the date for the inter partes hearing of the application for stay of the execution of the judgment.

Frustrated by the apparent lack of urgency on the part of the learned trial Judge and with the Judgment already executed, the appellant decided to abandon the application before the lower court and instead took out an ex parte summons before a single judge of this Court the following day seeking the following remedies;

- (a) An order restraining the Respondents from acting, taking any action or holding themselves out as shareholders of Zambezi Portland Cement Limited;
- (b) An order restraining the Respondents from acting or holding themselves out as Directors of Zambezi Portland Cement Limited;

- (c) An order restraining the Respondents from transferring or causing to be transferred or in any way dealing with the 580, 000, 000. 00 shares of Zambezi Portland Cement Limited which, until the judgment of 21st May 2018, were registered in the name of the Appellant;
- (d) An order restraining the Respondents from procuring Zambezi Portland Cement Limited to increase and allot any shares or howsoever deal with the current share capital of Zambezi Portland Cement Limited of 1, 000,000,000 divided into 1, 000, 000, 000 shares of K1. 00 each and;
- (e) An order restraining the Respondents from calling or causing to be called any meeting of the members or Directors of Zambezi Portland Cement Limited

On the date appointed for the hearing of the application inter partes before the single judge of this Court, the Respondents moved the Judge as they would be heard on two preliminary issues mainly questioning the jurisdiction of the Judge to entertain the application. The objections were that firstly, the application for an injunction had not been made before the Court below and secondly that the Court of Appeal lacked original jurisdiction and as such the matter was improperly before the Court.

After hearing both parties on the preliminary issues and after carefully reviewing the relevant laws and precedents, the single judge came to the conclusion that even though she could claim jurisdiction under Order 59 Rule 14 (4) of the Rules of the Supreme

Court 1999 edition, she did not find any special circumstances to warrant her seizing jurisdiction without the application being first made before the High Court.

In this appeal, the Appellant seeks to have the ruling of the single judge set aside first and thereafter that the reliefs sought before her be granted to the Appellant and in addition for an order restoring the status quo of Zambezi Portland Cement Limited as it was prior to the execution of the Judgment of the High Court. The Appellant relied upon Order 59 Rule 10 (9) and 14 (4) to assert its position. It also relied on the affidavits and the arguments before the single Judge.

The Respondents filed heads of argument and argued largely as they did before the single Judge maintaining that this Court had no original jurisdiction to entertain an application for an injunction because no special circumstances exist to bring the matter within the contemplation of Order 59 Rule 14 (4) as submitted by the Appellant. Further, the Respondents have also sought to rely on the affidavit in opposition to Notice of Appeal filed into Court on 11th June 2018 and deposed to by one Elisha Ziba, a Clerk of Court in the Commercial Registry of the High Court.

From the matters deposed to in the said affidavit, the Respondents seek to justify the High Court's decision to give the application for stay a later inter partes hearing date on account that the affidavit shows that the application was only filed after lunch being the nineteenth to be filed according to the exhibited receipts.

So on this appeal the question still is whether or not this Court has jurisdiction to entertain an application for an order of injunction against a decision of the High Court or a quasi-judicial tribunal at first instance pending appeal. Without repeating what the single Judge of this Court said, we simply re-affirm that our jurisdiction has no such provision either by way of judicial precedent or statutory provision or indeed in our rules. What we find in our statutes and rules are provisions that vest jurisdiction to hear an application in both the High Court and the Court of Appeal but with a condition that the Court of Appeal will only hear such application if it has first been made before the High Court and the condition is stated in mandatory terms.

However, as submitted by Mr. Sangwa SC, this jurisdiction relates to leave to appeals and stay of execution. The Court of Appeal Rules are silent on the granting of an injunction pending appeal from the High Court to the Court of Appeal as can be deduced from Order 10 Rules 4 and 5. So in terms of Order 13 Rule 12, the jurisdiction conferred upon the Court of Appeal by Order 10 Rules 4 and 5 is secondary as it can only be exercised when the High Court has refused to grant the application either to appeal or for an order of stay.

In her Ruling the single Judge of this Court turned to Order 27 of the High Court Rules to hold that a High Court Judge has jurisdiction to grant an order of injunction even after judgment has been delivered. The Learned Judge then went on to note that she

knew of no case in this jurisdiction where the High Court has heard an application for an order of injunction pending appeal in order to bring the provisions of Order 27 of the High Court Rules within the ambit of Order 59 Rule 14 (4) of the Rules of the Supreme Court 1999.

The counter argument by Mr. Sangwa SC is that Order 27 of the High Court Rules only governs proceedings before the High Court and not matters on appeal. We agree with that argument whose net effect is that injunctions pending appeal are not provided for in the Rules of this Court leading to the inevitable recourse to the Rules of the Supreme Court of England pursuant to section 8 sub-section 1 (2) (a) of the Court of Appeal Act. Under that section, the Court is mandated to rely on the practice and procedure as set out in the Supreme Court Practice 1999 edition and the law and practice in the Court of Appeal of England in force up to 31st December 1999 where our law and rules do not have a provision. This provision is also contained in Order 1 of the Court of Appeal Rules.

Order 59 Rule 14 (4) provides as follows;

“Wherever under these rules an application may be made either to the court below or to the Court of appeal, it shall not be made in the first instance to the Court of Appeal, except where there are special circumstances which make it impossible or impracticable to apply to the court below”

It is clear that Order 13 Rule 12 of the Rules of this Court is similar to the above cited rule of the Supreme Court Practice except

ours does not provide for special circumstances. We can therefore, only turn to Order 59 Rule 10 to fill the lacuna in our Rules as regards the granting of an injunction because sub rule 9 of that Order provides as follows;

“In any proceedings incidental to any cause or matter pending before the Court of appeal, the powers conferred by this rule on the Court may be exercised by a single judge or the registrar.” “Provided that the said powers of the Court of Appeal shall be exercisable only by that Court or a single judge in relation to

(a) The grant, variation, discharge or enforcement of an injunction, or an undertaking given in lieu of an injunction and;

(b) The grant or lifting of a stay of execution or proceedings”

The single judge found that the above cited Order should be read together with Order 59 Rule 14 (4) and as such there ought to be special circumstances for this Court to claim jurisdiction where no similar application was made before the High Court. Our understanding of Order 59 rule 14 (4) is that the requirement for special circumstances to exist first only applies in cases where both the High Court and the Court of appeal are granted concurrent jurisdiction to entertain an application.

The single judge found that Order 27 of the High Court Rules conferred powers upon a High Court Judge to hear an application

for an injunction even after judgment and hence her conclusion that the Appellant's application could only be entertained by this Court if it demonstrated that special circumstances existed. Having found no special circumstances to warrant her claiming jurisdiction, the single judge dismissed the application.

Having considered Order 27 of the High Court Rules, we accept Mr. Sangwa, SC's submission that the said Order only relates to matters under consideration by the High Court as can be clearly discerned from the way it is couched and for ease of reference we reproduce Order 27 Rule 1 hereunder.

“In any suit in which it shall be shown, to the satisfaction of the Court or a Judge that any property which is in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, it shall be lawful for the Court or a Judge to issue an injunction to such party, commanding him to refrain from doing the particular act complained of or to give such order, for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to the Court or the Judge may seem meet and in all cases in which it may appear to the Court or a Judge to be necessary for the preservation or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court or a Judge to appoint a receiver or manager of such property, and, if need be, to remove the

person in whose possession or custody the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant to such receiver or manager all such powers for the management or the preservation and improvement of the property, and the collection of the rents and profits thereof, and the application and disposal of such rents and profits, as to the Court or judge may seem proper”

As can clearly be seen, this order deals with preservation of property which is the subject of a dispute in a suit before the High Court. There is no suggestion that the power subsists after the dispute has been adjudicated upon by the Court or Judge of the High Court. So in the absence of any other provision in the High Court Act or Rules thereof, a Judge of the High Court is not clothed with power to grant an injunction in a matter that is before the Court of Appeal. However, what Order 59 Rule 10 of the Rules of the Supreme Court 1999 does in effect is to confer upon the Court of Appeal in matters on appeal from the High Court such powers as would be exercised by the High Court. This means that Order 59 Rule 14 (4) applies only where the power to do an act is vested in both the High Court and the Court of Appeal.

Mr. Sangwa, SC, has argued that having found that the High Court had jurisdiction to grant an injunction pending appeal, the single judge should have found that special circumstances existed to warrant bringing the application directly to this Court. He cited the

fact that the changes that the application for an order of stay was intended to prevent had taken place and that in light of the manner the Judge in the Court below treated the application for stay, he did not expect any better treatment if he made the application for an injunction before the same Judge.

In the alternative, he has argued that even going by the single Judge's finding that no special circumstances existed, the Judge should have exercised her original jurisdiction to hear the application on the strength of section 8 of the Court of Appeal Act of 2016 because the Court of Appeal of England has original jurisdiction to entertain an application for an injunction pending appeal at first instance. Mr. Sangwa drew inspiration for his argument from the case of Ketchum International Plc v Group Public Relations Holdings Limited and Others¹.

In that case, after reviewing Order 59 Rule 10 (9) and Rule 14 (4) of the Rules of the Supreme Court, Stuart-Smith LJ. Stated,

“Not without considerable hesitation, I have come to the conclusion that the Court has concurrent original jurisdiction in such a case as this, similar to that exercised where a stay of execution is sought, and that the matter does not have to be raised by way of appeal”

The facts of the case are that the application for an injunction was refused by the judge in the Court below and then renewed in the Court of Appeal not by way of appeal. It is further noted that under

¹ [1996] 4 All ER 374

the laws governing proceedings in the High Court and the Court of Appeal of England, both Courts have power to grant an injunction. What Justice Smith said in the judgment is that under Order 59 Rule 10 (9), the Court of Appeal can exercise that power as a Court of first instance.

The power that Justice Smith claimed is not a jurisdiction pending appeal but first instance jurisdiction to grant an injunction possessed by the trial Judge which Order 27 of the High Court Rules grants to a High Court Judge in this jurisdiction. On that basis, we find that this Court has the power to claim that jurisdiction at first instance notwithstanding that no such application was made before the High Court pursuant to Order 59 Rule (9) of the Rules of the Supreme Court 1999 edition. It is therefore, our firm view that had the single judge of this Court directed her mind to the import of the two Orders cited above, she would have come to the same conclusion as we have. In fact the single judge went further to find that Order 27 gave power to a High Court Judge to entertain an application for an injunction pending appeal and hence her dismissal of the application for not having been made before the trial Judge first.

Even though we agree with Mr. Sangwa SC that Order 27 confers no such powers on a High Court Judge, we find that following that finding, though erroneous, the single judge should have nonetheless found that she had power to entertain the application on the strength of Order 59 Rule (9) of the Rules of the Supreme

Court 1999 edition as exposed by Mr. Justice Smith in the Ketchum International case (supra).

In opposition, the Respondents' thrust of their arguments is that this Court is by law an appellate Court whose mandate begins and ends with hearing and determining appeals from the High Court and other quasi-judicial tribunals pursuant to Order 10 Rule (1) and (2) as well as section 4 of the Court of appeal Act.

The Respondents also called into aid the case of Suri and another v Royal Credit Limited² in which after finding that Order 41 of the Rules of Court made it mandatory for an application for stay of execution or injunction first to be made before the High Court, it affirmed its independent and original jurisdiction on the same applications. This case was in support of our Order 13 Rule 12, a similar provision to Order 41 of the Rules applicable to the Suri case. In view of what we have already stated regarding Order 13 Rule 12 of our Rules, we do not find any merit in the arguments advanced by the Respondents.

In the alternative, the issue whether or not special circumstances existed to justify the taking of the application for an injunction directly to a single Judge of this Court, both parties have argued forcefully in support of their position. We however, wish to state at the outset that in view of the view we have taken that the single Judge of this Court had power to entertain the application for an

² (1995 - 1998) 2 E.A. LR 382

injunction at first instance, we find it necessary to address the issue for the sake of jurisprudential development.

The fact, as we find it on the record, is that the Parties were made to wait for the judgment of the High Court from the morning of 18th May 2018 until about 23:45 hours when the Judge signed it and handed it over to the registry officials to have it sealed. This was a Friday and on Monday, the 21st May 2018, the Appellant filed an ex-parte summons for an order to stay execution of the Judgment pending appeal. The application was accompanied by a certificate of urgency. On the same day, the records at PACRA were altered by which the Appellant was removed as a shareholder in Zambezi Portland Cement Limited and replaced by the Respondents in execution of the Judgment of the High Court. On the same date, the learned trial Judge made the ex-parte application inter-partes and fixed the 24th May as the hearing date at 10:30 hours.

Clearly, the application for a stay had been rendered academic and bound to fail as the judgment sought to be stayed had already been executed as no stay can be granted where there is nothing to stay. In what we believe was an act driven by frustration and understanding that the application for a stay of execution of the judgment would be an exercise in futility, Mr. Sangwa, SC, deemed it prudent to withdraw the application on 22nd May 2018 and instead launch a fresh application for a different remedy before a single Judge of this Court. This is the application which was dismissed and gave rise to the appeal before us.

Apart from the legal issues we have already disposed of in this judgment, Mr. Sangwa SC has argued that in view of the manner the learned trial Judge had handled the Appellant's application for a stay, he did not expect any different treatment with regard to the application for an injunction assuming that the lower Court had jurisdiction to entertain an application pending appeal. At page 7 paragraph 27 of further arguments in support of injunction pending appeal, it is averred as follows;

“It was not intended to show that the Judge was a liar but to show that through the Judge’s conduct the Appellant’s application for a stay pending appeal had been defeated because the judgment of the Court was enforced on 21st May 2018, making the inter-partes hearing of the application moot”

We note from both the ruling of the single Judge at page 467 paragraph 4 of the Appellant's bundle of documents and the Respondents' supplementary arguments as well as in their oral submissions that it is intimated that Mr. Sangwa, SC, in his affidavit in support of the application for an injunction, accused the learned trial Judge of lying about being involved in an accident and projecting bias against the Appellant.

However, our careful perusal of the said affidavit filed into Court on 22nd May 2018, reveals no such insinuations. It would appear to us that this was how the learned single judge of this Court interpreted paragraph 23 of the affidavit in question. We however, note that

paragraph 23 of the affidavit was couched in language that is unbecoming of counsel of Mr. Sangwa SC's standing. We take the view that the deponent should have expressed his dissatisfaction with the manner the learned trial judge treated his application in a more respectful tone than he did.

We also accept the position that given the nature of the case, and the fact that the application was accompanied by a certificate of urgency, it deserved to be treated as such as failure to do so would and did in fact, lead to what the Appellant feared, the execution of the Judgment, much to the detriment of the Appellant.

We believe that advocates, as officers of the Court, have the right to express their sentiments of dissatisfaction against the Court as they seek redress through any legitimate judicial process. The dissatisfaction should however, not be directed at the person of the Judge but what counsel believes to be deficiencies in the Judge's manner of dealing with the case.

In view of the position we take of paragraph 23 of the affidavit deposed to by Mr. Sangwa SC, we deem it necessary to comment on the timing of the delivery of the judgment which is the subject of appeal.

It is our considered view that to start with, it was completely unnecessary for the learned trial Judge to deliver his judgment at 23:45 hours on a Friday if he was not prepared to attend to any urgent application by an aggrieved party as was the case with the Appellant during the weekend. The learned trial Judge, having not

firmed up his judgment before the close of the day on Friday, he should have postponed its release to Monday to avoid being inconvenienced during the weekend.

In this regard, we take the view that delivering judgments after normal official working hours and especially late at night is rather unusual and would normally be accompanied by a reason. We further take cognizance of the fact that after the delivery of the judgment that Friday evening, for whatever reason, the Court was unable to entertain an application for stay of execution of the said judgment over the weekend. It is not clear why the application for stay of execution was not heard first thing on Monday morning and as feared by the Appellant, the judgment was executed that same Monday morning.

We therefore, take the view that in the circumstances any advocate, acting for a client who is on the brink of losing what they believe is a huge investment as is the case with the Appellant, would have been greatly frustrated and exasperated at the way the learned trial Judge appeared to be in no hurry to attend to the application for stay until the judgment intended to be stayed was actually executed. We also accept Mr. Sangwa, SC's sentiments that he feared that taking the application for an injunction before the same judge would not have received any different reception.

It is for the above stated reasons that in our view, even if we were to proceed under Order 59 Rule 14 (4) of the Rules of the Supreme Court, the single Judge should have found that the seemingly

casual manner in which the judge handled the application for stay until the judgment was executed, constituted special circumstances to warrant the hearing of the application for the injunction.

We are accordingly of the firm view that the appeal before us should succeed to the extent that the remedies sought have not been effected already by the Respondents.

According to the Ex parte summons on appeal to the Court of Appeal from the Ruling of a single judge of the Court of appeal filed into Court on 1st June 2018, the Appellant seeks the following remedies;

1. The discharge of the ruling of the single Judge of this Court dismissing the application for an order of injunction
2. An order that the Respondents whether by themselves, their servants, or agents or howsoever, otherwise, be restrained and an injunction be granted restraining them until after the appeal of the appellant from the judgment of the honourable Mr. Justice S.B. Nkonde dated 18th May 2018, shall have been determined or until further order from:
 - (a) Acting, taking any action or holding themselves out as shareholders of Zambezi Portland Cement Limited
 - (b) Acting or holding themselves out as directors of Zambezi Portland Cement Limited
 - (c) Transferring or causing to be transferred or in any way dealing with the 580, 000, 000 shares of Zambezi Portland

cement Limited which until the Judgment of 21st May, 2018 were registered in the name of the Appellant

(d) From procuring Zambezi Portland Cement Limited to increase and allot any shares or howsoever deal with the current share capital of Zambezi Portland Cement Limited of K1 billion divided into 1,000,000,000 of K1.00 and

(e) Calling or causing to be called any meeting of the members or directors of Zambezi Portland Cement Limited

3. Respondents within two days from the date of the order do file such documents and do such things and take such actions as may be necessary to restore the membership and composition of the Board of Directors of Zambezi Portland Cement Limited obtaining before 21st May 2018 in the records of Zambezi Portland Cement Limited kept by the Patents and Companies Registration Authority (PACRA)

Of all the above prayed for remedies, we find no difficulty in granting the first one namely, setting aside the single Judge's order dismissing the application for an order of injunction and we discharge it accordingly.

As regards remedies 2 (a) and (b), and 3, we find the same to be untenable at law as granting them would amount to reversing the judgment of the Court below without hearing the appeal. We therefore, refuse to grant the three remedies.

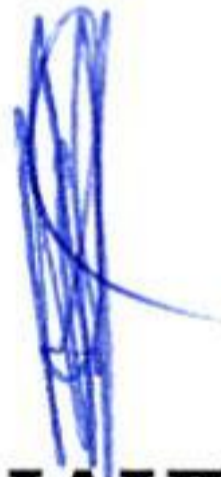
We however, find that remedies (c) to (e) are appropriate in the circumstances as the status quo should remain as such until the appeal is heard and determined and we grant them accordingly.

All in all the appeal succeeds in so far as it seeks to discharge the single Judge's dismissal of the application for an order of injunction and we grant the injunction sought with respect to the remedies which do not have the effect of reversing the lower Court's judgment in relation to the changes which were effected at PACRA on 21st May 2018.

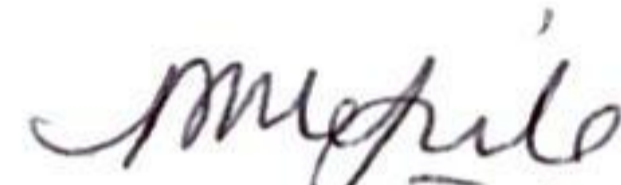
We award costs before the single judge and before the Court to the Appellant to be taxed by the registrar in default of agreement.



M.M. KONDOLO
COURT OF APPEAL JUDGE



M.J. SIAVWAPA
COURT OF APPEAL JUDGE



B.M. MAJULA
COURT OF APPEAL JUDGE