

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 25/2018

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

HOPE FOUNDATION FOR WOMEN AND CHILDREN

APPELLANT

AND

MUNALULA LINYATI

1ST RESPONDENT

ATTORNEY-GENERAL

2ND RESPONDENT

SEPISO SIMONDA

3RD RESPONDENT



CORAM: CHASHI, SIAVWAPA AND NGULUBE, JJA

On 24th April, 6th June and 6th September, 2018.

For The Appellant: E.B. Mwansa, SC, Messrs EBM Chambers,
D. Findlay, Messrs D. Findlay and Associates

For the 2nd Respondent M. Lukwasa, Deputy Chief State Advocate,
Attorney-General's Chambers.

For the 3rd Respondent: C.L. Mundia, SC, Messrs C.L. Mundia and
Company

J U D G M E N T

NGULUBE, JA. delivered the Judgment of the Court.

Cases referred to:

1. *Warmingtons vs. Mc Murray* (1936) 2 All ER 745
2. *Ituna Partners vs. Zambia Open University* SCZ/8/128/2008
3. *Henry Nsama and Others vs. Zambia Telecommunications Company* SCZ/8/296/2011
4. *Attorney-General vs. Achiume* (1983) ZR 1

**5. William Masauso Zulu vs. Avondale Housing Project Limited
(1982) ZR 172 (SC)**

Legislation referred to:

**1. The Legal Practitioners Act, Chapter 30 of the Laws of
Zambia**

This is an appeal against a Ruling of the High Court that was delivered on 16th November, 2017, at Lusaka under Cause 2006/HPA/022 . The appellant raised the following grounds-

On ground one, that the Honourable Court below erred in law and fact when it held that there were no special circumstances warranting the grant of an order for security for costs, when in fact the appellant could not be located and the respondent could not recover previous costs both in the Supreme Court and before the High Court.

On ground two, that the court erred in law and in fact in taking into consideration matters contained in the affidavit dated 30th March, 2017 for an application for joinder which was not yet tabled or scheduled before the court and which application the appellant herein had not been given an opportunity to be heard.

On ground three, that the court below erred in law and in fact in taking into account the evidence in paragraph 9 of the aforesaid affidavit dated 30th March, 2017, that the appellant was not the

instructing client. It was contended that the court failed to properly consider the effect of Section 52 of **The Legal Practitioners Act**¹.

In ground four, that the court below erred in law and in fact by evaluating and applying the principles of the case of **Warmingtons vs. Mc Murray**¹ with the circumstances herein, when in fact the principles applicable therein relate to costs recoverable by Counsel on retainer for the entire contract, whereas in the this matter, the court was asked to determine and consider whether Counsel could properly proceed to conclude the matter, prepare affidavits and court process without the specific authority of his client's instructions.

The brief background leading to the Ruling appealed against is that, the appellant filed a notice of appeal in the High Court from a decision of the Subordinate Court and raised several procedural issues that related to the filing of the appeal in the High Court, as no special leave to appeal had been obtained from the Subordinate Court. This led to the first appeal in the Supreme Court which resulted in the matter being sent back to the High Court before a different Judge. Subsequently, the Supreme Court granted the joinder of the Attorney-General and

Sepiso Simonda as the 2nd and 3rd respondents. Costs were awarded to the appellant, who sought to recover the costs from the 1st respondent.

The appellant then filed an application for security for costs and to dismiss the matter for want of prosecution. However, the costs were not paid and could not be recovered from the respondent. The appellant insisted on the hearing of the application for security for costs and to have the matter dismissed for want of prosecution. The lower court delivered its Ruling on 16th November, 2017 and declined the appellant's application, prompting this appeal.

In ground one, it was submitted that the basis upon which the application was made was that the appellant in the court below failed to settle the costs both in the Supreme Court and the High Court as taxed. It was submitted that, the 1st respondent, the main litigant and only appellant in the court below, could not be located and that this was confirmed by his advocates.

It was submitted that the court below ought to have relied upon Order 47 Rule 10 of the High Court Rules which provides for appeals from the Subordinate Court to the High Court. It was

further submitted on the issue of special circumstances, citing Order 59 Rule 10(32) of the Rules of the Supreme Court (RSC) that-

“To allow an appeal to the Court of Appeal to proceed without security for costs being furnished in circumstances where the respondent will be unable to enforce against the appellant would be unjust.”

It was submitted that the appellant would not be able to recover any costs from the 1st respondent as he is untraceable and further that previous costs had not been settled. It was contended that the advocates on record were not properly instructed by the 1st respondent and that as such, the appellant would be put to great expense in enforcing any order for costs in tracing the 1st respondent.

It was submitted that the court's discretion on appeal should be exercised with caution as it is wider and stricter than applicable in the court below. It was submitted that the court exercised its discretion in error when it failed to consider that the appellant would have difficulty in enforcing costs.

In ground two, it was submitted that the court below was unbalanced in its evaluation of evidence by considering the contents of the affidavit without according the appellant an opportunity to respond and not properly evaluating the contents of the affidavit, particularly that Messrs C.L. Mundia and Company were not acting for the 1st respondent and had no instructions on the matter.

On ground three, it was submitted that the court below failed to consider the effect of section 52 of The Legal Practitioners Act. Counsel cited the case of **Ituna partners vs. Zambia Open University**² where the Supreme Court stated that an advocate can only institute proceedings on behalf of a person after obtaining instructions from that person. Counsel submitted that the 1st respondent did not instruct Messrs C.L. Mundia and company but the instructions were sanctioned by the family of Sepiso Simonda. It was submitted that the evidence does not support the court's conclusion on direct retainer that at all times, the retainer was by the late Sepiso Simonda's family.

On ground four, it was submitted that the present case raises the issue and question whether a retainer ever came into being and whether proceedings could continue in the absence of the 1st

respondent. It was submitted that the court below erred in failing to take all the circumstances of the case and concluded that there were established special circumstances for granting security for costs and as such, the court failed to discharge its discretion accordingly. Counsel prayed that the appeal be allowed. The 3rd respondent filed heads of argument on the 30th May, 2018.

In ground one, it was submitted that the court below was on firm ground when it found that there were no special circumstances warranting an order for security for costs. It was argued that an award for security for costs is at the discretion of the Judge and that in doing so, the court exercised its discretion judiciously. Counsel referred to Order 59/10/32 of the Rules of the Supreme Court (RSC) which provides that-

“Security for costs of an appeal may be ordered where there are special circumstances which render it just to order security for costs or on any statutory ground.”

Counsel further referred to Order 40 Rule 7 of The High Court Rules which provided that –

“The court or a judge may, on the application of any defendant, if it sees fit, require any plaintiff in any suit, either at the commencement or at any time during the progress thereof, to give security for costs to the satisfaction of the court or a judge, by deposit or otherwise or to give further or better security, for the costs of any particular proceeding undertaken in his interest.”

It was submitted that the Judge in the court below was satisfied in her findings of fact that no special circumstances existed to warrant an order for security for costs and then declined to grant the order.

It was submitted that the appellant's claim in the court below was bonafide and that, the claim has good prospects of succeeding. Counsel referred us to the case of **Henry Nsama and Others vs. Zambia Telecommunications Company Limited**³ where the Supreme Court held that, ordering security for costs in the matter, where the appellants were a group of people who were unemployed, would be tantamount to blocking them from prosecuting the appeal.

Counsel submitted that a plaintiff who is ordinarily resident out of jurisdiction may convince the court against ordering security

for costs if he were able to show that the application was being used oppressively to stifle a genuine claim. It was submitted that the appellant's apprehension of non-recovery of costs is ill founded and merely intended to hinder the hearing of the matter on its merits. Counsel prayed that this ground of appeal be dismissed for lack of merit.

In ground two, it was submitted that State Counsel's affidavit sworn on 30th March, 2017 contained issues and facts that were cardinal to the determination of the application before the lower court and that the affidavit was merely for purposes of making findings of fact that were discretionary. Counsel referred us to the cases of **Attorney-General vs. Achiume⁴** and **William Masauso Zulu vs. Avondale Housing Project Limited⁵** where it was stated that findings of fact will only be reversed by an appellate court where it is satisfied that they were perverse or made in the absence of any relevant evidence. It was submitted that the court was on firm ground when it considered the contents of the affidavit when making findings of fact in this matter.

On grounds three and four, it was submitted that Messrs C.L. Mundia and company were retained to act as advocates for the

late Simonwa Simonda's family against the Minister of Works and Supply, one Golden Mandandi and the Attorney-General in the year 2000. It was submitted that through an ex-parte originating notice of motion, the family of the late Simonwa Simonda were evicted from the house in 2006, and that the property was then acquired by Hope Foundation Limited which in turn sold the house to VDF Property Management Limited. Messrs C.L. Mundia and Company then lodged an appeal to the High Court and the Supreme Court which was allowed by the Supreme Court and the matter was then sent back the High Court for trial.

It was submitted that the court below was on firm ground in terms of Section 52 of **The Legal Practitioners Act** because Messrs C.L. Mundia and Company were instructed to lodge an appeal to the High Court in respect of the eviction of Simonwa Sinonda's family. It was submitted that the question whether the 1st respondent, Munalula Linyati is a party to these proceedings will be determined by the court during the appeal as the said 1st respondent was a mere caretaker of the property. State Counsel prayed that the court dismisses the appeal for lack of merit.

We have considered the submissions by both Counsel, the heads of argument, the authorities cited and the Ruling of the court below.

The issues that this court must determine in this appeal are -

(1) Whether the court below erred when it held that there were no special circumstances warranting the granting of an order for security for costs.

(2) Whether the court below erred in law and fact in considering matters contained in the affidavit dated 30th March, 2017 which the appellant had no opportunity to rebut and whether the appellant was denied the right to be heard on the issue.

(3) whether the court properly considered Section 52 of the Legal Practitioners Act.

(4) Whether the lower court properly evaluated and applied the principles of the case referred to, **Warmingtons vs. McMurray** and whether Messrs C.L. Mundia and Company could proceed to conduct the matter without specific instructions from their client.

On ground one, it was submitted on behalf of the appellant that the lower court erred in law and fact in holding that there were

no special circumstances warranting the grant of an order for security for costs when the appellant could not be located. Order 23 Rule 1 of the Rules of the Supreme Court, 1999 edition states that where a court thinks just to do so, it may order the plaintiff to give such authority for the defendant's costs or other proceeding as it thinks just. Order 55 Rule 7(6) of the Rules of the Supreme Court (RSC) states that –

“the court may, in special circumstances order that such security may be given for the costs of the appeal as may be just.”

Order 59/10/32 RSC states that –

“security for the costs of an appeal may be ordered where there are special circumstances which, in the opinion of the court, render it just to order security; or on any statutory grounds.”

We form the view that the court below exercised its discretion judiciously when it did not find any special circumstances warranting the grant of an order for security for costs. It is worth noting that the appeal is against a decision of the Subordinate Court which saw the eviction of the respondent from the house in issue. As the lower court's Ruling pointed out, the appeal will determine the propriety or otherwise of the lower court's decision.

It is in the interests of justice that this matter proceeds and an order for security for costs would effectively see the end of this matter. We are of the view that there are no special circumstances that warrant the grant of an order for security for costs. This ground is accordingly dismissed for lack of merit.

In ground two, it was submitted that the court should not have considered matters that were contained in the affidavit dated 30th March, 2017 which the appellant had no opportunity to respond to. On the issue of the affidavit, the lower court stated that it was counsel's prayer that in the interests of justice, the issue relating to the representation of the appellant be resolved.

We have considered the issue of the affidavit that was sworn by State Counsel dated 30th March, 2017. It goes without saying that this affidavit contained averments which assisted the court in making findings of fact in the matter. Without going into the merits of the case, the lower court was given historical facts of how the cause of action arose. The court then used its discretion to make findings of fact on the averments in the said affidavit.

When the appeal proceeds in the lower court, the appropriateness of the Subordinate Court's decision as well as

the averments in the contentious affidavit will be tested. The appellant will be able to address the issues at that stage. We form the view that ground two lacks merit and it is accordingly dismissed.

In ground three, the issue is what effect Section 52 of **The Legal Practitioners Act** has on this matter. In the case of **Ituna Partners vs. Zambia Open University**, the Supreme Court stated that –

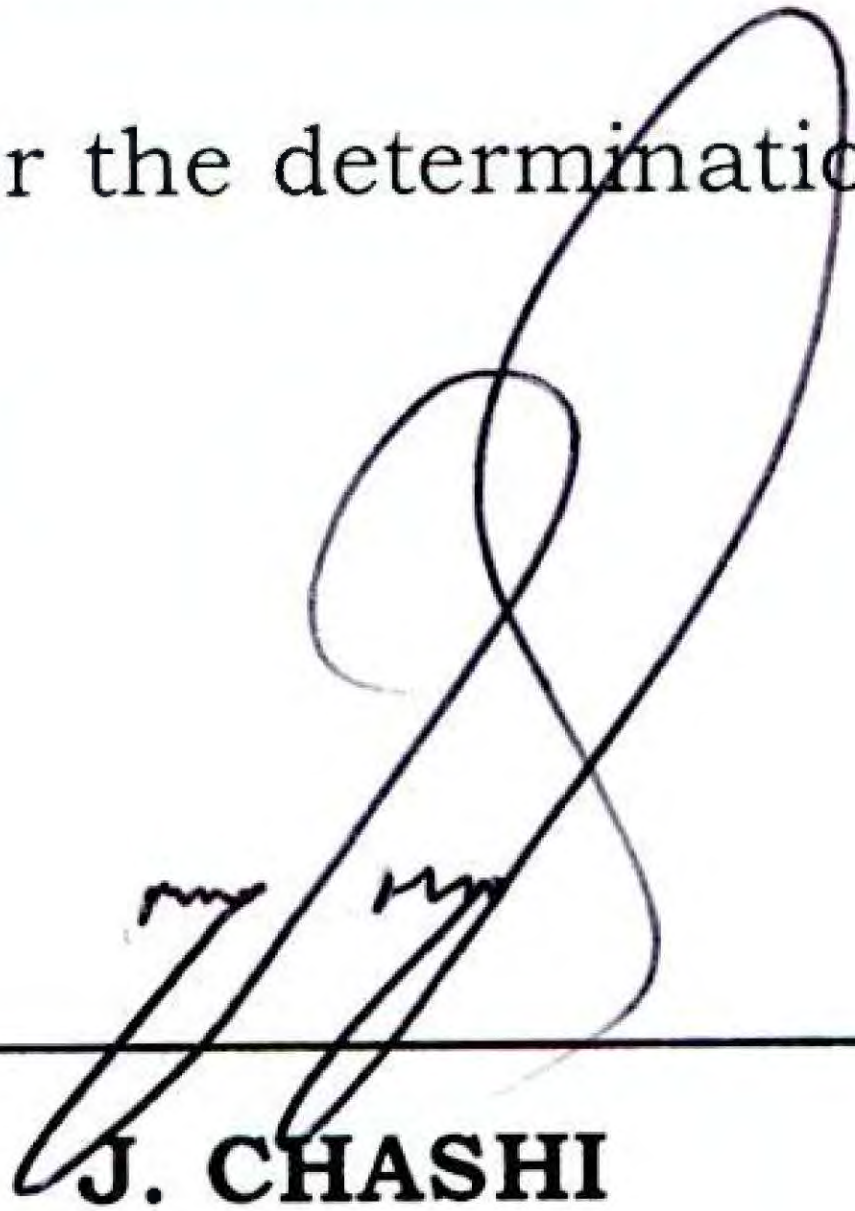
“It would be extremely unfair and setting a bad precedent if counsel would, on his or her own volition commence legal proceedings in the name of a person without the person’s instructions.”

In the matter in casu, the lower court found that the 1st respondent commenced the matter in the Subordinate Court on 28th February, 2006. The court found at page 13 of its Ruling that Messrs C.L. Mundia and Company are on record as having filed the notice of intention to appeal against the Judgment of the Subordinate Court on 10th April, 2006. The lower court went on to find that Messrs C.L. Mundia were retained to prosecute the appeal.


The court found that there was no evidence on record that would suggest that the appellant withdrew his instructions from Messrs Mundia and Company and that as such, that Section 52 of **The Legal Practitioners Act** cannot apply. We note that they lodged the appeal from the Subordinate Court in this matter and have endeavoured to prosecute the appeal over the years in various courts. It is therefore inconceivable to imagine that Messrs C.L. Mundia and Company are vigorously trying to prosecute the appeal without instructions from their clients. As the lower court stated, no evidence has been led to show that in fact, instructions were withdrawn from Messrs C.L. Mundia and Company. We do not find merit in this ground of appeal and it is dismissed.

Having found that Messrs C.L. Mundia and Company had instructions to lodge the appeal from the Subordinate Court to the High Court in 2006, it follows that they cannot be said to be acting without instructions in this matter as there is no evidence on record to show that their clients withdrew instructions from them. This ground of appeal fails for lack of merit.

All ground of appeal having failed the net result is that this appeal fails and it is dismissed in its entirety. The matter is sent back to the High Court for the determination of the appeal. Each party shall bear its costs.



J. CHASHI
COURT OF APPEAL JUDGE



J.M. SIAVWAPA
COURT OF APPEAL JUSGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE