IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.202/2007**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

JES MINING CO LIMITED	**1ST APPELLANT**
ERIC ROUTLEDGE	**2ND APPELLANT**
ARTHUR NDHLOVU	**3RD APPELLANT**
PETER M. KANG'OMBE	**4TH APPELLANT**

(3rd & 4th Appellants as Joint Receivers of JES Mining Co. Limited)

AND

BOSCIA LIMITED **RESPONDENT**

Coram: Mwanamwambwa, DCJ, Hamaundu, Kajimanga Kabuka and Mutuna, JJS
On 23rd January, 2017 and 16th May, 2018

For the 1st and 2nd appellants: Messrs Chugani & Co
For the 3rd and 4th appellants: Messrs MNB Legal Practitioners
For the respondent : Mr V. Michelo, Messrs V.N. Michelo & Partners

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

This motion is brought by the respondent under **Rule 78** of the **Supreme Court Rules, Chapter 25** of the **Laws of Zambia**, the slip

rule. The respondent would like us to correct our judgment of the 2nd March, 2010 with regard to the portion where we said that the respondent, in its second attempt to restore the *mareva injunction* that it had earlier obtained, did not show evidence that it had obtained leave to proceed against the receivers of the 1st appellant.

The background to this motion is this:

The respondent sued the 1st and 2nd appellants for money due to it on a failed joint business venture between it and the appellants. Before the matter proceeded to trial, the respondent applied for, and obtained, judgment on admission against the two appellants in the sum of US$300,000. The 1st appellant was subsequently placed under receivership, whereupon the 3rd and 4th appellants were appointed receivers. The receivers proceeded to advertise some assets for sale. The respondent then applied for, and obtained, a *mareva injunction* against the 1st appellant on 22nd February, 2008. On 11th March, 2008, the 1st appellant, through the receivers, applied *ex parte* and obtained an order setting aside the *mareva injunction*. On 21st April, 2008 the respondent applied for what it termed a "*special*

review" of the order setting aside the *Mareva injunction*. The court rejected that application on the following grounds;

(i) That it was out of time; and,

(ii) That the respondent, in any event, had not obtained leave to proceed against the receivers.

The court directed that the respondent was at liberty to make another application which was in compliance with the law. The respondent then went back to the court and obtained an order joining the 3rd and 4th appellants to the action in their capacity as receivers, on 28th May, 2008. The respondent then applied again for *"special review"* of the order setting aside the *mareva injunction*. This time, the application was granted and the *mareva injunction* was restored on 5th June, 2008. The appellants applied to set the injunction aside. Their application was rejected. They, then, appealed to this court.

In our judgment, we lamented the entertainment by the court below of numerous applications and counter-applications. We said that that was a demonstration of a lack of appreciation of the rules of procedure by the learned trial judge. After reviewing **Order 39** of the **High Court Rules, Chapter 27** of the **Laws of Zambia** and **Order 59** of the **Rules of the Supreme Court** *(White Book)* we came to the

conclusion that the only applications which the learned judge correctly entertained were; the first application in which she granted the *Mareva injunction*; and, the second application in which she set the injunction aside.

We went on to hold that the subsequent applications were misconceived because **Order 39** of the **High Court rules**, under which they were premised, does set out conditions under which the procedure for review can be invoked; one of which is that the court has to be satisfied that there are sufficient grounds to invoke it. We noted, however, that the learned judge in this case did not disclose the grounds upon which she was satisfied that there was merit in invoking the procedure. Commenting, particularly, on the respondent's second attempt to restore the injunction, which succeeded, we said the following:

> **"Also there is no proof on the record that leave was sought and granted to the respondent to proceed against the receivers".**

It is this statement that has given rise to this motion. The respondent referred us to an order headed **"Ex parte Order for leave to Add Receivers to proceedings",** dated 2nd May, 2008.

At the hearing, the appellants and their respective advocates were not present. Upon proof that they had been served with the notices of hearing, we proceeded to hear the motion.

Mr Michelo, learned counsel for the respondent submitted that the order that we have cited above had been on the supplementary record of appeal when the appeal was being argued. He argued that, had we seen that order, we would have realized that the respondent had been granted leave to add the receivers as parties to the action; and that, therefore, we would not have made that statement in the judgement. When we pointed out to counsel that the order that was being referred to us was an order for joinder of parties to the action and not an order for leave to proceed against a company in receivership, counsel responded that, according to him, the two orders were one and the same thing.

First, we wish to point out that joining a party to an action, on one hand, and seeking leave to proceed against a company in receivership, on the other, are two different steps that serve two different purposes. In one, a litigant will add a party to the action mainly because he has a claim against such party; or that the party to be added has an interest in the action or may be affected by the outcome. In the other application, leave is sought to commence or

continue proceedings against a company because of the company's changed circumstances. In this case, the 1st appellant was already a party to the action. Once a receiver is appointed, it is only the receiver who is allowed to represent the company. There was, therefore, no need to join the receivers in their individual names to the action unless the respondent wanted to sue them in their individual capacities. It was sufficient to merely show that the 1st appellant was now in receivership. The receivers would then be the only recognized representatives of the 1st appellant. We wish to point out at this juncture that, when we said that there was no proof that leave was sought and granted to proceed against the receivers, we were looking for an order that granted the respondent leave to continue proceedings against the 1st appellant in view of the fact that it was now under receivership. We were not looking for the order of joinder which, as we have explained, is granted for a different purpose. For that reason, we were not wrong in our observation that the order granting the respondent leave to continue proceedings against the 1st appellant was not on record.

Having said that, however, we wish to say that our statement, in so far as it conveyed the meaning that there is need to apply for leave to proceed against a company in receivership, was incorrect.

While **Section 281** of the **Companies Act**, **Chapter 388** of the **Laws of Zambia** provides that, when a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against a company except by leave of the court. There is no similar provision that applies to a company that is in receivership. We have found no provisions of law elsewere that prohibit the commencement, or continuation, of an action against a company in receivership. Therefore, there was never any requirement for the respondent to seek leave of the court to continue proceedings against the 1st appellant when the latter went into receivership.

The above correction does not, however, change the outcome of the appeal. The second attempt by the respondent to restore the *mareva injunction*, which succeeded, was found by us to have been granted contrary to the conditions set out under **Order 39** of the **High Court Rules**. That was the main reason why we held it to have been misconceived. Our observation that there was no evidence on the record to show that leave to proceed against the receivers had been sought and granted was made merely in passing.

For the above reason, this motion is without merit. We dismiss it. Since the appellants did not take any step to defend this motion, we make no order as to costs.

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M. S. Mwanamwambwa

DEPUTY CHIEF JUSTICE

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E. M. Hamaundu

SUPREME COURT JUDGE

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C. Kajimanga

SUPREME COURT JUDGE

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J. K. Kabuka

SUPREME COURT JUDGE

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N. K. Mutuna

SUPREME COURT JUDGE