IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 172/2015
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

PUMA ENERGY ZAMBIA PLC **APPELLANT**

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION **RESPONDENT**

Coram : Hamaundu, Wood and Chinyama, JJS
On 20th July, 2017 and 11th May, 2018

For the Appellant: Mr. E. Silwamba S.C., Messrs Eric Silwamba, Jalasi and Linyama, Legal Practitioners, Mr.N. Nchito, S.C, Messrs Nchito and Nchito Advocates, Mr. J. A. Jalasi and Mr L. Linyama, Messrs Eric Silawamba, Jalasi and Linyama Legal Practitioners and Mrs. S. N. Kateka, Messers Nchito and Nchito Advocates

For the Respondent: Mr. C. Siamutwa, Messrs C. Siamutwa Legal Practitioners and Mrs M. Mwanza, Legal Counsel

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:

1. **N.B. Mbazima & Ors v Reuben Vera [2001] ZR 43**

2. **Bank of Zambia v Aaron Chungu, Access Financial Services Limited and Access Leasing Limited [2008] 1 ZR 81**
3. **Trevor Limpic v Rachel Mawere [2014] 2 ZR 303**
4. **BP Zambia Plc v Interland Motors [2001] ZR 37**
5. **Aaron v Shelton [2004] 3 All E.R 560**
6. **Henderson v Henderson [1843-60] All E.R. 378.**

Legislation referred to:

1. **The Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia, Section 25**
2. **The Supreme Court Rules, Chapter 25 of the Laws of Zambia, Rules 48, 75 & 78**
3. **Competition and Consumer Protection Act**

Works referred to:

1. **Blacks Laws Dictionary, 10th Edition, (Thomson Reuters, 2014) page 1452**
2. **Rupert Cross & J.W. Harris, Precedents in English Law (4th ed. 1991) pages 65-66**

This motion is brought under **Rules 48** and **78** of the **Supreme Court Rules, Chapter 25** of the **Laws of Zambia**. The motion seeks to achieve two things; first, it seeks to reverse a ruling and order of a single judge of this court which was made on 30th December, 2016. Secondly, it seeks to correct or expunge certain pronouncements that we made in our judgment of the 9th March, 2016. The following is what has given rise to this motion.

Between February 2012 and April, 2012, the appellant and the respondent became embroiled in a protracted dispute about whether or not the appellant could distribute Castrol Products in Zambia. The

dispute culminated in the Board of Commissioners of the respondent imposing a fine on the appellant of 2% of its annual turnover on 17th August, 2012 for breach of the respondent's directives. Aggrieved by that decision, the appellant appealed to the Competition and Consumer Protection Tribunal, raising nine grounds of appeal. The first ground of appeal, in particular, stated as follows:

> **"That the Board of Commissions erred in fining the appellant without first applying to this tribunal for a mandatory order in line with Section 64 of the Competition and Consumer Protection Act, No. 24 of 2010"**

The tribunal resolved the appeal entirely on that ground. It agreed with the appellants' contention that the respondent needed to obtain a mandatory order from the tribunal before it could proceed to fine the appellant.

The respondent appealed to the High Court which held that the respondent did not need to first seek a mandatory order from the Tribunal before it could impose a fine on the appellant. The High Court reversed the Tribunal's decision and ordered that the appeal before the Tribunal proceeds on the remaining eight grounds. The

appellant appealed to this court. On 9th March, 2016 we rendered a judgment in which we upheld the High Court's decision.

Upon receipt of the judgment, the parties failed to agree on the terms of the Order of the court that was to be drawn in accordance with **Rule 75** of the **Rules** of the **Supreme Court, Chapter 25** of the **Laws of Zambia**. This prompted the respondent to apply to the court to settle the Order as provided for by **Rule 75(2)**. The application was submitted to one of the judges who sat at the hearing of the appeal. The judge settled the order in the following terms:

> **"(1) The respondent had jurisdiction to fine the appellant under section 37 of the Act without resorting to Section 64(1). Therefore, the respondent's decision dated 17th August, 2012 to fine the appellant be and is hereby upheld.**
>
> **(2) The respondent did not authorize the appellant to become the distributor of Castrol Products on the Zambian market. Therefore, it is prohibited from doing so in line with the respondent's directives issued on 1st February, 2012 and 30th April, 2012"**

The second limb of the order is what has brought about this motion. The appellant advanced the following two questions for our consideration:

"(a) Can a single judge of the Supreme Court of Zambia Hearing an application for the embodiment of a judgment of the Supreme Court of Zambia into an order under the provisions of Rule 75 of the Supreme Court Rules, Statutory Instrument No. 70 of 1975 (as amended) The Supreme Court of Zambia Act, Chapter 25, Volume 3 of the Laws of Zambia embody *'obiter dicta'* from the judgment in the order?

(b) Can the Supreme Court of Zambia which is the Final Court of Appeal of the Republic of Zambia properly determine matters still competently and jurisdictionally before the Competition and Consumer Protection Tribunal thereby taking away a litigant's right to appeal the determination of those issues to the High Court for Zambia (and now to the Court of Appeal of Zambia) and subsequently to the Supreme Court of Zambia and taking away the express jurisdiction of the Competition Consumer Protection Tribunal to hear appeals from the Competition and Consumer Protection Commission?"

The main argument advanced on behalf of the appellant was this: That an order drawn under **Rule 75** of the **Rules** should only embody the *ratio decidendi* of the court's judgment and not the *obiter dictum*; and, that in this particular case, the second limb of the order was drawn from the *obiter dictum* part of our judgment.

It was argued that the *ratio decidendi* of our judgment was defined by the grounds of appeal that the appellant raised against the judgment of the High Court, which read as follows:

> **"<u>Ground 1</u>**
>
> **The court below erred in law and fact when it held that the respondent had jurisdiction to fine the appellant under Section 37 of the Competition and Consumer Protection Act and that it is not mandatory for the respondent to obtain a Mandatory order of compliance from the Competition and Consumer Protection Tribunal.**
>
> **<u>Ground 2</u>**
>
> **The court below erred in law and fact when it held that the Competition and Consumer Protection Tribunal erred in law and fact by finding that The respondent acted ultra vires the Act without jurisdiction."**

It was submitted that these were the only two grounds that were before us. According to learned counsel, we resolved the issues in the first ground of appeal when, in our judgment, we held as follows:

> **"the holding by the learned judge that the respondent had jurisdiction to fine the appellant under Section 37 of the Act; that it is not mandatory for the respondent to obtain a Mandatory Order of compliance from the Tribunal; and that Section 64(1) is not a mandatory provision are, in our view, flawless. Clearly, it is**

> **within the respondent's discretion to apply for a mandatory order of compliance which, in our view, is one of the mechanisms available to the respond in the enforcement of the provisions of the act."**

Again, learned counsel pointed out that the issues raised in the second ground of appeal were resolved in a portion of our judgment which stated thus:

> **".... ...the learned judge cannot be faulted for finding that the respondent did not act ultra vires the Act by invoking Section 37 and imposing a fine on the appellant as this power is reposed in it by the Act."**

It was submitted that the above two holdings are what constituted the *ratio decidendi* of the judgment; and that everything else was *obiter*. Learned counsel argued, in particular, that our pronouncements that the appellant could not distribute Castrol Products in Zambia were not only *obiter* but touched on an issue which was yet to be determined by the Tribunal and, therefore, was not properly before this court for us to delve into it. In this regard, it was argued that we lacked jurisdiction to determine that issue. We were referred to the case of **N.B. Mbazima & Ors v Reuben Vera**[1] in support of that argument. In support of the argument that our pronouncements were *obiter* we were referred to the case of **Bank of**

Zambia v Aaron Chungu, Access Financial Services Limited and Access Leasing Limited[2] where we held that *obiter* does not form part of the judgment and is not binding.

We were also referred to the case of **Trevor Limpic v Rachel Mawere**[3] where we struck out certain portions of our earlier judgment which we found to have been *obiter*.

Learned counsel argued that on the strength of the arguments and authorities relied upon, the second limb of the order ought not to have been included because it reflected the *obiter* part of our judgment.

In response, learned counsel for the respondent submitted that the single judge properly settled the order of the court in that it summed up the core of the court's judgment; and that any dilution of the order would render the judgement of the court worthless. It was submitted that we did hold in our judgment that the appellant abrogated the conditional approval of the take over and the respondent had not at any point authorized the appellant to deal in Castro branded products. It was submitted, further, that we did also hold that the appellant acted with impunity, which conduct justified the fine imposed upon it by the respondent.

Counsel went on to point out that, at the time of drafting the order, the appellant had an opportunity to counter-propose the wording of the order but chose not to make any suggestions. According to counsel, the appellant slept on its rights.

In the alternative, it was argued that the grounds that the appellant intends to argue before the Tribunal are now *res judicata*. According to counsel, this is because this court did observe that inspite of the fact that nine grounds of appeal were raised before the Tribunal, the only relief sought therein was that the respondent's directives be quashed and that the fine be overturned. Counsel submitted that the respondent had argued at length that it had not breached any condition imposed and had not abrogated the 2012 directives. According to counsel, this court then comprehensively reviewed the facts of the case, looked at the relevant documents and came to the conclusion that the respondent acted with impunity in abrogating the conditional approval of the takeover.

Counsel went on to argue that the court was not making these findings merely in passing, but was laying the foundation for the ultimate decision that it made regarding the jurisdiction of the

respondent. It was argued that such findings could not be said to be *obiter dicta*.

It was then argued that the respondent should have anticipated that this court would review the documents before it and should, therefore, have taken the opportunity to argue its case comprehensively and not in piece-meal fashion. We were referred to our decision in **BP Zambia Plc v Interland Motors**[4] where we frowned upon parties who deployed their grievances piece-meal, in scattered litigation. Other cases were cited also on the same subject, namely, **Aaron v Shelton**[5] and **Henderson v Henderson**[6].

We have considered the arguments by both sides. This motion is about whether or not the order that was settled by a single judge of this court reflects its judgment of the 9th March, 2016. More to the point, the question is whether the second limb of the order has embodied the *orbiter* portion of the judgment and should, therefore, not be part of the order. We agree with the argument by the appellant that *obiter dicta* does not form part of the enforceable part of a judgment; and since the drawing of the order is intended to facilitate enforcement of the judgment, *obiter dicta* can, obliviously, not be embodied therein.

In this case, we were drawn into examining the documents that gave rise to the dispute because of the arguments that the appellant advanced before us. For example, one of the arguments advanced by the appellant in the second ground of appeal ran as follows:

That the fine imposed by the respondent was illegal as the appellant did not breach the respondent's directive to restore the 2002 position in respect of Castrol Products distribution in Zambia; and that under clause 3.2 of the agreement between BP Africa and Dana Oil any entity in the BP group could supply Castrol Products, but with conditions.

That argument was of great significance to the appeal; particularly its outcome. By that argument, we were being called upon to decide that irrespective of whether or not the respondent needed to obtain a mandatory order before it could fine, in this case the basis upon which it could impose a fine had not arisen; meaning that, from that aspect alone, the fine that it imposed on the appellant was illegal. In order to resolve that argument, we had to delve into the origin of the dispute as presented to us by the documents on record. Had we found that, indeed, the appellant had not breached the directives, our decision would have been that the respondent had

no basis upon which to impose the fine and, therefore, the fine was illegal. In the end, however, we found that the appellant had breached the directives, meaning that the imposition of the fine was justified.

We are alive to the appellant's argument that the issue concerning whether or not the appellant had breached the directive was not properly before us in that it had not yet gone through the process; that is, from the Tribunal, through the High Court, (or Court of Appeal) up to the Supreme Court. According to the **Supreme Court of Zambia Act**, **Chapter 25** of the **Laws of Zambia**, a statute that governs the operations of this court, we are not restricted to determine matters only through that narrow channel. We are empowered to deal with any matter with the ultimate aim of meeting the ends of justice. For example, **Section 25(1)(b)(i)** provides:

> **"On the hearing of an appeal in a civil matter, the court—**
>
> **(b) may, if it thinks it necessary or expedient in the interest of justice—**
>
> **(i) Order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case"**

The section goes on to give this court power to summon witnesses, even those who were not called at trial; and also, to receive

evidence tendered by witnesses. The point we wish to make in this case is that arguments were raised in this case whose resolution would fundamentally affect the position of the parties. And, in order for us to resolve those arguments, we were required to delve into the source of the dispute. Assuming that no document was on record to give us an insight of the dispute, **Section 25(1)(b)(i)** did give us power to order the parties to produce such documents in order to enable us arrive at a decision. In this particular case, however, the documents were on record. We, therefore, do not agree with the appellant's argument that the issue was not properly before us. It was properly before us because a fundamental question posed by the arguments in the appeal demanded that we delve into that issue in order for us to answer it.

Finally, was the issue *obiter dicta* or was it part of the *ratio decidendi*. **The Black's Law Dictionary, 10th edition**, defines *ratio decidendi* as:

> **"The principle or rule of law on which a court's decision is founded."**

Of greater assistance to the issue at hand is the passage quoted

by the editors of **Blacks Laws Dictionary** from the works, **Rupert Cross & J.W. Harris, Precedents in English Law, (4th ed. 1991) pages 65 – 66**. The passage reads:

> **"There are..... two steps involved in the ascertainment of the ratio decidendi.... First, it is necessary to determine all the facts of the case as seen by the judge; secondly, it is necessary to discover which of those facts were treated as material by the judge"**

As we have said, we think that this passage is of great assistance. In this case, it is important to consider the questions that were at the core of this appeal. The first question was whether, on the interpretation of **Section 64** of the **Competition and Consumer Protection Act**, the respondent required to first obtain a mandatory order from the Tribunal before it could exercise its powers under **Section 37** of the **Act** to fine the appellant. The second question was whether the basis for the respondent's exercise of its power under **Section 37** had arisen at all, considering that, in the appellant's view, the latter had not breached the respondent's directives. The second question, as we have pointed out, was material to the appeal because had it been resolved in favour of the appellant it would have affected the fine that the respondent had imposed. Again, we have

already pointed out that the second question demanded of us to examine the source of the dispute in order to arrive at a decision; This, we did and came to our conclusions. Clearly, the second question was material to this appeal and our findings thereon formed part of the *ratio decidendi*. Those findings are the ones that comprise the second limb of the order that was settled by the single judge. That means that the order does not embody any obiter.

In conclusion, we find the order to contain no *obiter dicta*. Accordingly, we dismiss this motion, with costs to the respondent.

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E. M. Hamaundu

SUPREME COURT JUDGE

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A. M. Wood

SUPREME COURT JUDGE

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J. Chinyama

SUPREME COURT JUDGE