Master

IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 137/2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER FOR AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO ORDER 53 OF THE RULES OF THE SUPREME COURT 1999 EDITION (WHITE BOOK)

AND

IN THE MATTER FOR AN ORDER FOR MANDAMUS AGAINST THE MINISTER OF FINANCE AND NATIONAL PLANNING FOR THE APPOINTMENT OF THE MEMBERS AND REGISTRAR OF THE CAPITAL MARKETS TRIBUNAL PURSUANT TO INTER ALIA SECTIONS 185 AND 188 OF PART XVIII OF THE SECURITIES ACT NO. 41 OF 2016 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF A DECISION OF THE SECURITIES AND EXCHANGE COMMISSION DECISION OF 5 JUNE 2017 BEING A DECISION SOUGHT TO BE CHALLENGED BY THE APPLICANTS BUT WHICH THE APPLICANTS HAVE NO FORUM TO BE HEARD DUE TO THE NON-APPOINTMENT OF THE MEMBERS AND THE REGISTRAR OF THE CAPITAL MARKETS TRIBUNAL

BETWEEN:

SECURITIES AND EXCHANGE COMMISSION	**APPELLANT**

AND

ANHEUSER-BUSCH INBEV	**1ST RESPONDENT**
ZAMBIA BREWERIES PLC	**2ND RESPONDENT**
NATIONAL BREWERIES PLC	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**
THE MINISTER OF FINANCE AND NATIONAL PLANNING	**5TH RESPONDENT**

CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJA

On 4th October 2018 and 14th December, 2018

FOR THE APPELLANT: MRS. DIANA SICHONE & MISS VERONICA SICHONE (IN HOUSE COUNSEL)

FOR THE 1ST, 2ND & 3 RESPONDENTS: MR. R. PETERSON OF MESSRS CHIBESAKUNDA & CO.

FOR THE 4TH & 5TH RESPONDENTS: MR. E. TEMBO, ASSISTANT SENIOR STATE ADVOCATE

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to

1. *Newplast Industries v The Commissioner of Lands and the Attorney-General SCZ Judgment No. 8 of 2001*

2. *Zambia Revenue Authority v The Post Newspaper SCZ Judgment No. 18 of 2016*

3. *R (on the application of Land and Other) v Executive Council of the Accountants' Joint Disciplinary Scheme [2002] EWHC 2086*

This is a consolidated appeal arising out of a ruling on an application for leave to apply for judicial review and a Judgment on the substantive application for judicial review commenced by the 1st, 2nd and 3rd Respondents herein (hereinafter referred to as the Respondents).

In its ruling of 1st March 2018 and the Judgment of 12th June 2018, the Court below ordered that leave to commence judicial review

shall operate as a stay of the Appellant's decision to collect the authorization fees from the Respondents upon merger of the 2nd and 3rd Respondents.

In the Judgment on judicial review, the learned trial Judge granted an order of Mandamus against the 4th and 5th Respondents as well as a stay of the Appellant's decision to collect the said authorization fees.

In the Application for leave to apply for judicial review and the subsequent application for judicial review, by the Respondents, the Respondents were the Appellant, 4th and 5th Respondents.

However, before the Ruling and Judgment were delivered, the Appellant, which was the 3rd Respondent in the applications for leave to apply for judicial review and the substantive application for judicial review raised a preliminary issue questioning the propriety of the mode by which the Respondents sought to challenge its decision to collect authorization fees via a judicial review rather than via an appeal to the tribunal as stipulated by the Act.

The Respondents also raised a preliminary issue challenging the mode by which the Appellant had raised the preliminary issue by Notice instead of a writ.

In her ruling the learned trial Judge declined to entertain the challenge by the Respondents for want of jurisdiction, while she dismissed the Respondents' preliminary issue on account that it was curable.

In her ruling at page 157 line 17 of the Record of Appeal, the learned Judge stated as follows;

> ***"This Court has no jurisdiction to entertain any matter arising from the application of the Act as the Act itself has stipulated that any party dissatisfied with the decision of the Commission ought to appeal to the Tribunal."***

Then, in its Judgment on the substantive application for judicial review, from page 44 line 24 and 25 to page 45 lines 1 to 5 of the Record of Appeal, the court below stated as follows;

> ***"It is my further considered view that the process of appealing once the Tribunal is set up will be rendered nugatory if the 3rd Respondent (the Appellant herein) proceeds to execute its decision before the hearing. I therefore also grant the order staying execution of the 3rd Respondent's decision, as it is inextricably tied to the intended Appeal..."***

These are the two statements by the court below that aggrieved the Appellant giving rise to the appeal, before us.

The Appellant accordingly raised two grounds of appeal through two memoranda of appeal, one in respect of the ruling on the

application for leave and the other on the Judgment on the substantive application for judicial review.

In essence however, the ground is just one and we shall for the purposes of this appeal, adopt the one raised in consequence of the Judgment.

The ground is couched in the following terms;

> ***"The learned High Court Judge erred in law when she granted the Applicants therein an order staying execution of the Securities and Exchange Commission's decision to charge an authorization fee for the take-over of Zambia Breweries PLC and National Breweries PLC".***

Both parties filed their heads of argument and authorities relied upon.

In a nutshell, the Appellant is arguing that the learned trial Judge in the Court below self-contradicted by stating in one breath that she had no jurisdiction to entertain a matter arising from the Act and in another granting an Order staying the execution of the decision of the Appellant to collect authorization fees.

It is submitted that if that part of the Judgment were allowed to stand it would amount to granting a relief to the Respondents on an improperly commenced matter.

The Appellant has relied on the Supreme Court of Zambia decision in Newplast Industries v The Commissioner of Lands and the Attorney-General[1]. The instructive part of that Judgment is as follows;

> ***".....it is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute. Thus, where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure....we therefore hold that this matter, having been brought to the High Court by way of judicial review, when it should have been commenced by way of an appeal, the court had no jurisdiction to make the reliefs sought....Thus, where any matter under the Lands and Deeds Registry Act is brought to the High Court by means of Judicial Review, when it should have been brought by way of an appeal the court has no jurisdiction to grant the remedies sought."***

Subsequent Judgments of the Supreme Court of Zambia confirmed the *Newplast* decision.

In response, the Respondents have argued, in the main, that the Appellant is estopped from raising in this appeal, issues not raised in the Court below.

Without wasting time, this argument is completely devoid of merit as the mode of commencement was canvassed in the notice of

intention to raise a preliminary issue, filed by the Appellant in the Court below which gave rise to the ruling of 27th February 2018.

On the main argument of jurisdiction, it is submitted that, under Order 53 Rule 3 (10) an order for stay of proceedings is provided for upon leave being granted.

The Supreme Court Judgment in Zambia Revenue Authority v The Post Newspaper[2], is distinguished on the ground that it dealt with a ruling or a judgment which was not the case in the Court below which dealt with a decision of the Appellant.

The Respondent also placed heavy reliance on a statement from a book simply cited as; "Judicial Review" without further detail of the authors, publishers, the year of publication and the edition, for cross-checking by the Court. The said statement states as follows;

> ***"There is a right to a stay of pending related proceedings when the creation of one set of proceedings may prejudice the fairness of another".***

Further the case of R (on the application of Land and Other) v Executive Council of the Accountants' Joint Disciplinary Scheme[3] in which Mr. Justice Stanley Burton states as follows;

> ***"The jurisdiction to stay one of two concurrent sets of proceedings must be exercised sparingly and with great care..."***

Was called into aid.

The issue at hand is whether the Court below had jurisdiction to grant an order to stay the decision of the Appellant to collect authorization fees from the 2nd and 3rd Respondents. The challenge on the jurisdiction of the Court below is anchored on the now well established position of the law that failure to adhere to a statute provided mode of commencing an action divests the trial Court of jurisdiction to hear and determine the action. The case of *Newplast Ltd* (Supra) refers.

In this case, however, the Respondents moved the court below by way of judicial review under Order 53 of the Rules of the Supreme Court 1999 Edition.

The key relief they sought was an order of mandamus against the 4th and 5th Respondents to compel them to perform their statutory function to appoint the Chairman, members and the Registrar of the Capital Markets Tribunal which would in turn hear their appeal against the decision of the Appellant.

Under Sections 185 and 188 of the Securities Act No. 41 of 2016, the Minister of Finance is mandated to appoint the Chairman, Vice-Chairman, members and the Registrar of the Capital Markets Tribunal. The Act, then clothes the Tribunal with the jurisdiction to hear appeals against any decision of the Appellant.

The Respondents, being aggrieved by the decision of the Appellant, had no avenue for the redress of their grievance in the absence of the Tribunal hence their decision to move the Court below for judicial review.

The challenge before the said Respondents was that obtaining leave to commence judicial review did not offer interim relief against the decision of the Appellant and hence, their decision to seek a second relief for the leave, if granted, to act as a stay of the decision of the Appellant. This relief was sought pursuant to Order 53 Rule 3 (10) of the Rules of the Supreme Court.

The question then is whether that relief is available against an administrative body whose decisions are by statute impeachable through a prescribed procedure before another quasi-judicial body.

The above question is closely related to the question whether, in view of the process prescribed by the Act, the Appellant was properly cited as a party to the judicial review action. Of course it is trite that judicial review does not concern itself with the merits or demerits of the decision being challenged but rather with the decision making process.

However, it is noteworthy in this case that the decision of the Appellant was not the subject of review before the Court below. What was under review was the non-action by the Minister of

Finance, the 5th Respondent when she failed to constitute the Tribunal in contravention of the Act.

It is however, common cause that it was the said decision of the Appellant that necessitated the commencement of judicial review proceedings in the Court below so that a forum at which its decision could be challenged may be put in place.

In context therefore, the Appellant was made a party to the proceedings because it was likely to be affected by the outcome of the judicial review proceedings. The subsequent order of mandamus granted against the 4th and 5th Respondents meant that a body through, which the Appellant's decision could be challenged would be constituted thereby affecting the Appellant. So we take the view that to the extent that the Court below was not called upon to, and did not consider the propriety or otherwise of the decision of the Appellant, the Court assumed no jurisdiction over the decision of the Appellant.

The learned authors of De Smith's Judicial Review of Administrative Action, 4th Edition, Stevens and Sons Limited London 1980, at page 510 had this to say;

> "***Not only must there be a Plaintiff whose legal interests are affected sufficiently to enable him to sue; the defendant must be one whose legal interests are sufficiently affected by the Plaintiff's claim (or whose conduct could be sufficiently affected by Judgment in the***

Plaintiff's favour) to render him a competent party to defend the action. And even if a competent defendant is before the Court, the Court will, save in exceptional circumstances, decline to make a declaration affecting the interests of persons who are not before it; all those whose interests are liable to be affected should be made parties to the action."

It is clear that the interests of the Appellant were liable to be affected in this case and as such it was the right thing to make it a party.

We now consider the question whether or not it was within the Court's powers to stay the Appellant's decision, when in fact it was not subject of the order of mandamus.

Order 53 Rule 3 (10) of the Rules of the Supreme Court provides as follows;

"Where leave to apply for judicial review is granted, then-

(a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the court otherwise orders.

(b) if any other relief is sought, the Court may, at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

Clearly (10) (a) does not apply to this case because the relief sought was not one of those set out therein.

It is (10) (b) which is applicable as mandamus would fall within that category.

The learned trial Judge granted the order of stay on the basis that the decision intended to be appealed against is intricately related to the intended appeal such that not granting the stay would render the order of mandamus nugatory as the Appellant was likely to execute the decision.

In essence, the order of stay granted by the Court below is in aid of the order of mandamus so that the Appellant does not enforce its decision to collect the authorization fees until the Tribunal is set up and the Appellants can lodge their appeal against the non-waiver of the fees in full.

Having so stated, we are satisfied that the learned Judge in the Court below acted within the ambit of Order 53 Rule 3 (10)(b) of the Rules of the Supreme Court 1999 as the order granted at the leave stage could not be sustained under Rule 3 (10)(a).

It is also our considered view that the learned Judge in the Court below made the order within the contemplation of Section 13 of the High Court Act Chapter 27 of the Laws of Zambia which empowers the Court to administer law and equity concurrently and we reproduce it hereunder for ease of reference.

"In every civil cause or matter which shall come in dependence in the court, law and equity shall be administered concurrently and the court, in the exercise of the jurisdiction vested in it, shall have the power to grant and shall grant, either absolutely or on such reasonable terms and conditions as shall seem justice, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter so that as far as possible all matters in controversy between the said parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided and in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail".

Under the above cited provision the Court below had power to apply equity in arriving at her decision to grant a relief asked for by the Respondent against the Appellant.

As regards the argument based on the much celebrated case of *Newplast Industries Limited v The Commissioner of Lands and the Attorney-General*, we note that the issue there was the mode of commencement of an action.

The principle laid down therein is that, the mode of commencing an action will by and large be determined by an Act of Parliament and not the relief sought.

Based on that principle, an action commenced in violation of the mode prescribed by the relevant Act confers no jurisdiction upon the Court to hear and determine such a case.

We wish to note that in the case before us, there is no conflict in that respect because even though the Securities Act No. 41 of 2016 provides for an appeal to the Capital Markets Tribunal to challenge any decision of the Appellant, it is clear in our mind that the judicial review proceedings in the court below were not instituted to challenge the Appellant's decision making process.

The wrong mode of commencement principle is therefore not the basis upon which the learned trial Judge's decision to grant an order of stay can be challenged. As a corollary to the above, a challenge based on the wrong mode of commencement principle is premised on lack of jurisdiction and we are of the view that the Court below had jurisdiction because the action was commenced by way of judicial review but not to challenge the Appellant's decision or its decision making process.

It should therefore be very clear that in this case, it would be a wrong mode if the Respondents had commenced judicial review to challenge the Appellant's decision or decision making process as the mode prescribed by the relevant Act is by way of appeal to the Tribunal. So, not only would the mode be wrong but the forum too.

In fact, this seems to be more specific to the impropriety of the forum than the mode, namely, writ of summons or notice of motion or petition et cetera. For the remedies sought, the mode of commencement was the correct one both as to the format and the forum.

So, the trial Judge, having found in favour of equity, we do not fault her in that regard. The order of stay is necessary to allow the Respondents to pursue their appeal against the Appellant's decision before the correct forum. It would be unfair to allow the Appellant to put the said Respondents to an expense they wish to challenge before they are afforded the opportunity to do so.

The fact that the 4th Respondent had not appointed the Capital Markets Tribunal at the time the Appellant made the decision being objected to should not have any negative effect on the said Respondents as they are not blameworthy.

Under Section 24(1) (a) the Court of Appeal Act No. 7 of 2016 provides as follows;

> ***"The court may on hearing of an appeal in a civil matter- Confirm, vary, amend, or set aside the judgment appealed against or give judgment as the case may be".***

We accordingly dismiss the appeal and order each party to bear their own costs.

.....
J. CHASHI
COURT OF APPEAL JUDGE

.....
F. M. LENGALENGA
COURT OF APPEAL JUDGE

.....
M. J. SIAVWAPA
COURT OF APPEAL JUDGE