IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 195/2016**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

OPTIMA BUSINESS CONSULTANTS LIMITED (In Liquidation) **1ST APPELLANT**

PLATINUM GOLD EQUITY LIMITED (In Liquidation) **2ND APPELLANT**

AND

PLATINUM INVESTMENTS LIMITED **RESPONDENT**

Coram: Hamaundu, Wood, Malila JJS.

On 12th December, 2019 and 9th January, 2020.

For the Appellants: *Mr B. Luo - Messrs Palan & George Advocates*

For the Respondent: *Ms J. Mutemi - Messrs Theotis Mataka & Sampa Legal Practitioner*

JUDGMENT

Wood, JS, delivered the Judgment of the Court.

Case referred to:

1. *Mundia Sikatana v The Attorney-General (1982) Z.R 109.*

Legislation referred to:

1. *Sections 289, 290 and 336 of the Companies Act Cap 388 of the Laws of Zambia (repealed)*

Works referred to:

1. *O.4, r.9 RSC, O. 42/5A (1) RSC, O.20, r. 11 RSC, O.21, r.3 (1) RSC*
2. *Halsbury's Law of England paragraph 283 Volume 37 4th edition*
3. *Atkins Court Forms Volume 15 2nd Edition 1994*

This is an appeal against a decision of the High Court which held that a consent judgment in cause number 2015/HN/285 in which the appellants in this appeal were respondents and the respondent was a petitioner, did not discontinue cause number 2015/HPC/441. Cause number 2015 /HPC/441 is the subject of this appeal.

The brief background leading to this appeal is as follows. On 15th October, 2015, the respondent filed an originating summons claiming the following against the appellants:

i) *Payment of all sums of money which as at 22nd September, 2015 stood at US$1,265,000.00 interest and other charges due and owing to the respondent.*

ii) *Foreclosure*

iii) *Possession of 4999, ordinary shares in the 2nd appellant*

iv) *Sale of the said ordinary shares; and*

v) *Interest on the above at the current bank lending rate*

vi) Costs

The affidavit in support of the originating summons disclosed that the respondent was owed the sum of US$1,150,000.00 by the 2nd appellant which debt was secured by a charge on the 2nd appellant's shares owned by the 1st appellant. It is quite apparent from the flurry of litigation in cause numbers 2015/HPC/484, 2015/HP/2148, 2015/HPC/441, 2015/HN/302, 2015/HN/285 and 2015/HPC/0479 in Lusaka and Ndola which culminated in two consent judgments in cause number 2015/HN/285, that the claim under cause number 2015/HPC/441 was part of a complex web of transactions involving a mortgage, various money claims, sale and liquidation.

The first consent judgment was entered on 30th October, 2015. This judgment placed the 1st and 2nd respondents into liquidation. In addition to these two parties a company called Kitwe Development Limited was also placed into liquidation. On 23rd November, 2015 a second consent judgment with more parties and orders was signed. The second judgment states in its second clause

that the respondent and five others were joined as petitioners while one Lewis Mosho was joined as a respondent. The other clauses which are relevant outline how the parties were going to distribute the proceeds arising from the sale of Stand No. 7732 Kitwe and how a shareholder loan due to Tzannetis Aristides Serlemitsos, who was the 4th petitioner, was going to be dealt with. More importantly is clause 6 which forms the bedrock of this appeal. Clause 6, to which we shall return shortly, is couched in the following terms:

> *"6. Further, the Parties herein agree to withdraw and discontinue unconditionally the court proceedings under Causes No. 2015/HPC/484, 2015/HP/2148, 2015/HPC/441 and 2015/HN/302 and not to commence or continue with any proceedings whatsoever and howsoever in connection with the liquidation and winding up of the 1st, 2nd and 3rd Respondent."*

Sometime in 2016, the respondent filed a summons for an order for an account by the liquidator of the appellants. Before the application could be heard, the appellants filed a summons on 12th February, 2016 to dismiss the matter on a point of law as well as to discharge an injunction which had been obtained earlier by the respondent. The point of law raised related to clause 6 in the consent judgment which stated that the respondent had agreed to

withdraw and discontinue unconditionally the court proceedings under cause number 2015/HPC/441 and as such was barred from commencing or proceeding with the action under cause number 2015/HPC/441.

For completeness of the narrative, we must mention that we have not seen any application on the record of appeal for joinder in the various matters referred to in the second consent judgment, nor have we seen any application for consolidation of the various causes prior to their inclusion in cause number 2015/HN /285 . Lastly we have not seen any summons, motion or notice prior to the second consent judgment being signed by the judge. During oral arguments, both counsel for the appellants and respondent informed the Court that they did not have any proof of a summons or notice of motion leading to the consent judgment. They also did not have any evidence to show that the various causes had been consolidated.

The learned judge disagreed with the appellants' submission that the matter was non-existent because it had been withdrawn and discontinued. He also rejected the appellants' argument that

the order obtained or made under the cause was a nullity. The learned judge instead agreed with the respondent's argument that the matter could only be withdrawn by either filing a notice of discontinuance, a written consent to the action being withdrawn signed by all the parties and by making an application for the grant of leave by either summons or motion. The learned judge then held that the respondent had not discontinued the action and that the action was in existence. In the circumstances he held that there was no multiplicity of court actions or an abuse of the court process. He also found that the respondent was merely effecting its legal right when it made an application for an injunction. He accordingly dismissed the application to raise a preliminary issue on a point of law or discharge the injunction.

The appellants have now appealed to this Court and renewed their arguments which they canvassed in the Court in the following four grounds of appeal:

1) ***Ground One***

The learned Judge in the court below erred in law and fact when he held that the matter under cause number 2015/HPC/441 that was withdrawn and discontinued unconditionally by the consent judgment issued by the

another High Court Judge under cause number 2015/HN/285 has not been withdrawn and discontinued and is still existent.

2) ***Ground two***

The learned Judge in the court below erred in law and fact when he held that there is no multiplicity of court actions and abuse of court process when the respondent re-commenced or continued with proceedings under cause number 2015/HPC/441 a cause already withdrawn and discontinued by consent judgment under cause number 2015/HN/285

3) ***Ground three***

The learned Judge in the court below erred in law and fact when he held that he has power/jurisdiction to hear and determine the issues/matters relating to the liquidation of the appellants when the same issues/matters are still active and continuing under cause number 2015/HN/285 before a court of similar jurisdiction.

4) ***Ground four***

The learned Judge in the court below erred in law and fact when he varied the consent judgment in cause number 2015/HN/285 issued by another High Court Judge of similar jurisdiction by holding that case number 2015/HPC/441 withdrawn by consent judgment under cause number 2015/HN/285 was not withdrawn and discontinued

The thrust of the appellants' heads of arguments is that there was a consent judgment in which the parties had agreed to withdraw and discontinue this action among others. As such the appellant cannot revive a matter which had been discontinued. The appellants further raised the issue of multiplicity of actions and that in doing so the respondent was abusing the court process. In addition the appellants have argued that the learned Judge had no

jurisdiction to hear and determine issues or matters relating to the liquidation of the appellants when these same issues were still active and continuing under cause number 2015/HN/285 before a court of similar jurisdiction. The last argument related to the variation of the consent judgment in cause number 2015/HN/285. It was argued that the parties had agreed on the terms of the judgment and as such its terms should be given effect as a judgment or order in terms of Order 42/5A (1) RSC.

The respondent has, on the other hand, argued that Order 21 Rule (2) (3A) of the Rules of the Supreme Court provides the procedure for discontinuing a matter begun by originating summons which the appellants did not adhere to. The respondent has also argued that the appellants had not adhered to the terms of the consent judgment which required them to sell Stand No. 7732 Kitwe and distribute the proceeds thereof to and for the benefit of the respondent companies and Kitwe Development Limited in accordance with the ranking and priority of claims. It could not therefore be argued by the appellants that there was multiplicity of actions.

With regard to jurisdiction, the respondent argued that the appellants could not rely on the case of *Mundia Sikatana v The Attorney General*[1] because there was no possibility of the High Court making any contradictory decisions over the same matter. Further the Court below was not being called upon to re-open and/or interfere with a matter which was already determined by another judge of competent jurisdiction. This was due to the fact that the application that was before the lower Court was simply intended to give effect to the consent order under cause number 2015/HN/285 by requiring the liquidator to perform his obligations. Lastly, the liquidator was subject to the control of the Court under section 289 of the then Companies Act Cap 388 of the Laws of Zambia. Under section 290 of the same Act he was required to have regard to the direction of creditors at a general meeting and an aggrieved party could apply to Court under section 336 of the same Act. The learned judge in the Court below therefore had jurisdiction to hear the matter.

We are grateful to the appellants for their heads of argument and their oral arguments. The common thread which appears to

run through all the grounds of appeal stems from the effect of clause 6 in the consent judgment. The issue which we must first address is whether or not correct procedural steps were taken by the parties which culminated in the consent judgment of 23rd November, 2015 leading to this appeal. Normally where two or more causes or matters are pending in the same Court and it appears to the Court that some common question of law or fact arises in both or all of them, or that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions or for some reason it is desirable to do so, the Court may order those causes or matters to be consolidated on such terms as it thinks just or to be tried at the same time. In this appeal it is apparent that there are a number of parties litigating over the same common question of law or fact before different judges and several actions have been commenced amongst the various parties. The appropriate step the parties should have taken first was to apply to consolidate the various actions into one suit so that they are tried at the same time before a single judge. This has the advantage of avoiding multiplicity of actions, conflicting decisions and according to the notes to O.4, r.9 RSC, it saves costs

and time. From the record of appeal it is quite apparent that this was not done with the respect to the various causes mentioned in the consent judgment. Even assuming that there was no need to consolidate the various actions because the matters were in any event being discontinued, there was still need for the movant of the application to discontinue, to make an application by either summons, motion or by notice under Order 25, rule 7 RSC for leave. The need for a summons or motion or notice for leave to discontinue can also be found in paragraph 283 of Halsbury's Laws of England Volume 37 4th edition where it states:

> *"The application for leave may be made by summons or motion or notice under the summons for directions.*
>
> *On the hearing of the application for leave the court may order the action or counter-claim to be discontinued, or any particular claim made in it to be struck out, as against any or all of the parties against whom it is brought or made, on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just."*

Volume 15 of Atkin's Court Forms 2nd Edn 1994 Issue guides as follows at page 10:

> "7. *Discontinuance or withdrawal of action or counter-claim with leave. The leave of the court is required to discontinue an action or counterclaim or withdraw any particular claim made or any question raised in it where a*

notice of discontinuance or withdrawal has not been served at all or within the prescribed time, or the notice was otherwise defective or ineffectual.

The leave of the court or the consent of all the other parties is required by the party in whose favour an interim payment has been ordered.

Accordingly, except in cases in which discontinuance or withdrawal without leave has been duly and effectually completed, or, if an interim payment has been ordered in his favour, the consent of all other parties has been obtained, a party may not discontinue an action whether begun by writ or otherwise, or counterclaim, or withdraw any particular claim or question made or raised by him in it, or discontinue or withdraw third party or contribution proceedings without the leave of the court.

Application for such leave may be made by summons or by notice under the summons for directions or motion. The summons or notice of motion should set out any terms which the applicant proposes to offer."

It can therefore be seen from the above authorities that it is imperative to issue a summons or notice of motion for leave to discontinue an action. It is not simply enough to draw up a consent judgment as was done in this case.

Tied to this is the overarching nature of the consent judgment itself. The consent judgment was signed by the late Mr. Justice Chali but it fettered the jurisdiction of Mr. Justice Mweemba as it effectively discontinued cause number 2015/HPC/441 which was before him. Although counsel for the appellant argued quite

forcefully on the need for judges not to interfere in matters before other courts of similar jurisdiction, he did not show the same enthusiasm in trying to explain or justify the signing of the consent judgment which affected a matter that was before Mr. Justice Mweemba. The reason for this is simple. The argument counsel used to justify non-interference also applied to cause number 2015/HPC/441 not being interfered with as it was before another judge of the High Court.

We also note from the record that the application by the respondent was prompted by the belief that it was not being treated equally as a secured creditor. The appellants have not challenged the claim by the respondent that it was excluded from the distribution of the payment of a dividend even though the evidence suggests that it was entitled to a payment of a dividend as a secured creditor. The consent judgment complained about was subject to the payment of creditors with the ranking and priority of claims as required by the then Companies Act. The explanatory notes to paragraph 283 of Halsbury's Laws of England show that a court has wide discretion as to the terms on which it will grant or

refuse leave to discontinue or withdraw the whole or part of the action or counterclaim under O.21, r.3 (1) RSC. The notes also show that where terms are imposed, the action survives until the terms are complied with. The terms on which the notice of discontinuance was granted have not been complied with. The action therefore survives until the terms are complied with. The respondent was accordingly entitled to protect what had been agreed upon.

The first and second grounds of appeal cannot therefore succeed as there is no proof that an application was ever made to discontinue the matter nor can it be said that there was a multiplicity of actions or an abuse of court process.

We agree with the argument that a judge of the High Court has no jurisdiction to re-open and reconsider and interfere with and comment upon a matter already determined by another Judge of equal jurisdiction as was decided in *Mundia Sikatana v The Attorney-General*[1]. This decision should however be distinguished from the facts surrounding this appeal. Cause number

2015/HPC/441 was before the honourable Mr. Justice Mweemba while cause number 2015/HN/285 was before the honourable late Mr. Justice I.C.T Chali. The matters were never consolidated nor was the matter formally discontinued. The learned Judge was in our view perfectly entitled to deal with cause number 2015/HPC/441 and reach a decision as it was not technically before the late honourable Mr. Justice I.C.T Chali. The learned Judge in cause number 2015/HPC/441 was not re-opening, reconsidering, interfering or commenting upon a matter determined by another Judge. The third ground of appeal has no merit.

We must mention that since the hearing of the appeal and the preparation of this reserved judgment we have had sight of a consent judgment in which the parties have agreed that the appellants should withdraw their appeal with costs in the sum of K90,000.00. We accept that parties are at liberty to agree a settlement at any time but we take the view that a consent judgment should also reflect the correct position at law. The consent judgment as drafted does not set aside the defective procedure adopted by the lower court nor does it set aside the

consent judgment signed by the late Mr. Justice Chali which is at the core of this appeal. We have therefore declined to endorse the consent judgment withdrawing the appeal.

For the reasons given earlier we also dismiss the fourth ground of appeal as the learned Judge could not have varied a consent judgment which was in any event a nullity in so far as the respondent was concerned. We therefore dismiss this appeal with costs to be agreed or taxed in default of agreement.

E.M.HAMAUNDU
SUPREME COURT JUDGE

A.M.WOOD
SUPREME COURT JUDGE

M. MALILA, SC
SUPREME COURT JUDGE