

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

**SP No. 25/2022
APP No. 188 of 2020**

BETWEEN:

JAYESH SHAH

AND

**MWENDA MWIMANENWA NYAMBE
MAUREEN MWANGALA MWENDA**



APPLICANT

1ST RESPONDENT

2ND RESPONDENT

**CORAM: Chishimba, Sichinga and Banda-Bobo JJA
On 3rd February, 2023 and 15th February, 2023**

For the Applicant : Mr. J. Andrew Wright of Messrs. Wright
Chambers

For the 1st Respondent : No appearance Messrs. Makebi Zulu
Advocates

For the 2nd Respondent : No appearance Messrs. Apton & Partners

R U L I N G

CHISHIMBA, JA, delivered the ruling of the Court.

Cases referred to:

1. Savenda Management Services Limited v Stanbic Bank Zambia Limited
Selected Judgment No. 10 of 2018
2. Bimzi Limited v B & C Commodities and Shipping Limited
SCZ/8/177/98
3. Chishala Karabasis Nevil & Sharon Mwale v Laston Geoffrey Mwale SCZ
Appeal No. 161/2015 (Selected Judgment No. 40 of 2018)

4. Bidvest Foods Zambia Limited & Others v CAA Import & Export Limited SCZ Appeal No. 56 of 2017
5. ZCCM Investment Holdings PLC v First Quantum Minerals Limited & Others Application No. SP 002/2021
6. Abishek Vijaykumar Patel v Henry Sampa & Bia Zambia Limited CAZ Appeal No. 65 of 2020
7. Kekelwa Samuel Kongwa v Meamui Georgina Kongwa SCZ/8/05/2019

Legislation referred to:

1. The Court of Appeal Act No. 7 of 2016 of the Laws of Zambia
2. The Court of Appeal Rules, 2016
3. The Rules of the Supreme Court of England, 1999 Edition

By way of notice of motion, the applicant seeks leave to appeal to the Supreme Court, an order for stay of execution pending appeal and leave to amend the cause number on the judgment of the court below.

The applications are made pursuant to **section 13(1) and (3)** of the **Court of Appeal Act No. 17 of 2016 (the CAA)**, **Order 11 rule 1(1), order 10 rule 5 and order 8 rules 1 and 2** of the **Court of Appeal Rules, 2016 (the CAR)**.

An affidavit in support of the motion was filed and deposed to by Jonathan Andy Wright, counsel seized with conduct of this matter on behalf of the applicant. Counsel deposed that the applicant is

dissatisfied with the judgment of this court rendered on 31st May, 2022 and has since drafted a notice of appeal and memorandum of appeal which the applicant intends to file into the Supreme Court subject to leave being granted. The intended grounds of appeal not only raise a point of law of public importance, but have merit and good prospects of success. The learned Counsel deposed that we misapprehended the facts of the case when we held that the trial judge “***gave what appears to be an order for directions***”. This order given by the trial judge is not sufficient for purposes of fulfilling the requirements of the law as regards the nature of an order for direction.

The second misapprehension of the facts by this Court is with regard to the anomalies in the documents at pages 144 to 150 of the record of appeal, namely the lands register, assignment and certificate of title. The deponent states that we misapprehended the facts in that we failed to appreciate the fact that the applicant is not the one that made the entries in the lands register.

The third misapprehension of facts is that we overlooked the fact that the 2nd respondent did not give the particulars of the alleged

fraud, or that we trivialized the importance of doing so in arriving at our decision.

The applicant states that the chances of success of the intended appeal are high; that the appeal raises points of law of public importance as revealed in the draft memorandum of appeal; and that there are compelling reasons for leave to appeal to be granted.

Mr. Wright further deposed that unless the execution of the judgment of this Court is stayed, the respondents will proceed to execute the said judgment. That there are special circumstances to warrant a stay of execution. The basis being that in an event that the judgment is executed and the Supreme Court reverses one decision, the applicant would have suffered ruin as there is no guarantee that the respondents would not dispose of the property in question.

The deponent states that no prejudice will be occasioned to the respondents if a stay of execution pending appeal is granted. That in fact, the order will serve the interest of justice as it will prevent the appeal from being rendered nugatory.

Lastly, it was deposed that a perusal of the judgment exhibited and marked as “**JAW1**” will reveal that the Cause Number is stated as **APP/188/2021** instead of **APP/188/2020** as per the extract of the record of appeal exhibited as “**JAW14**”. The applicant sought the indulgence of the Court to have the cause number amended and that no prejudice will be occasioned to the respondent by granting the order.

The applicant filed submissions in support of the motion. It was submitted that an applicant for leave to appeal to the Supreme Court, must satisfy one or more of the requirements listed under **section 13(3) of the CAA** as reiterated by the Supreme Court in **Savenda Management Services Limited v Stanbic Bank Zambia Limited** ⁽¹⁾. Those requirements being that the appeal raises a point of public importance, the appeal would have a reasonable prospect of success, or there is some other compelling reason for the appeal to be heard.

It was argued that in view of the misapprehension of the facts by this court, it is in the public interest that the Supreme Court should give guidance and clarify what amounts to the directions that a trial judge ought to have given in such circumstances. Without any

proper direction, the trial court was devoid of jurisdiction to have proceeded with the matter.

Further, the applicant contends that this Court misdirected itself in law when it held that the applicant is not an innocent purchaser for value without notice; and that we relied on documents with glaring anomalies, which documents were in fact generated by the Ministry of Lands. According to the applicant, this not only raises a point of law of public importance but also constitutes a compelling reason for leave to appeal to be granted.

The applicant further argued that he did not participate in any fraud for it to be imputed against him based on documents that were not generated by him. We were also faulted for failing to address our minds as to whether the trial Judge was clothed with the requisite jurisdiction to proceed in the manner that he did in the absence of a pleading for fraud.

With respect to the award of costs, the applicant cited **Order 12 rule 1 of the CAR** and contended that the 1st respondent having neither filed documents opposing the appeal nor contested it, raises a point of law of public importance requiring the apex court to

determine whether such a party is worthy of an award of costs whether for the entire appeal or part of it.

Equally that the 2nd respondent who did not file heads of arguments in opposition to the appeal whose application to file the same out of time was dismissed and was awarded costs. Therefore, the apex court ought to determine whether the 2nd respondent is worthy of costs in whole or part of the appeal.

As regards the stay of execution, the applicant placed reliance on **Order 45 rule 11 of the Rules of the Supreme Court, 1999 Edition** and the case of **Bimzi Limited v B & C Commodities and Shipping Limited** ⁽²⁾ whose import is that a stay of execution is a discretionary remedy to be granted where there are good reasons for doing so, special circumstances warranting to do so and where it is shown that the appeal has merit.

It was argued that the intended appeal has prospects of success and would be rendered nugatory if the stay is not granted.

Lastly, we were urged to make an order to amend the cause number from APP/188/2021 to APP/188/2020. That no prejudice will be occasioned to the respondents if this application is granted.

In conclusion, the applicant summarized the questions and/or issues that the Supreme Court will be called upon to decide as follows:

- i. Whether the learned trial Judge having not invoked the proper rule in the court below was clothed with the requisite jurisdiction to proceed in the manner that he did in the circumstances of the case;
- ii. Whether given the recent judgment in **Chishala Karabasis Nevil & Sharon Mwale v Laston Geoffrey Mwale** ⁽³⁾, fraud can be implied and/or inferred from the facts instead of being specifically pleaded;
- iii. Whether what appears to be a direction, notwithstanding that it relates to another application before the court, can fulfil the requirements of **Order 28 rule 8(1) of the Rules of the Supreme Court, 1999**;

- iv. Whether a court can cancel a certificate of title by imputing negligence or failure to conduct due diligence based on a document that is 589 days old after the assignment of the property. This is notwithstanding that the size and wrong names were not an issue that was raised before the trial court which highlights the fact that pleadings were desirable notwithstanding **section 59 of the Lands and Deeds Registry Act**;
- v. Whether a wrong finding of the court as to when a certificate of title was issued is supported by evidence;
- vi. Whether the learned trial Judge breached the rules of natural justice by failure to give proper directions;
- vii. Whether the order to pay back the purchase price to the applicant can compensate the damage suffered for loss of land; and
- viii. Whether the 1st and 2nd respondents are deserving of an award of costs and the manner the same were awarded to them.

The 1st respondent filed submissions in opposition to the notice of motion for leave to appeal to the Supreme Court dated 31st January, 2023. It was submitted that **section 13 of the CAA** is instructive of what requirements one ought to satisfy should they wish to move the court for an application for leave to appeal to the Supreme Court. The requirements being that the proposed appeal raises a matter of public importance, has reasonable prospects of success or that there are some other compelling reasons which warrant the appeal being heard by the Supreme Court.

In this regard, it was argued that a thorough perusal of the affidavit in support of the motion will show that the applicant has not demonstrated in the proposed appeal that it does in fact raise points of law of public importance which should warrant the grant of leave to appeal to the Supreme Court; or that there is something compelling, novel or exceptional about the proposed appeal for the Supreme Court to hear and determine.

The case of **Bidvest Food Zambia Limited & Others v CAA Import & Export Limited** ⁽⁴⁾ was cited where the Supreme Court explained what a point of law of public importance is and further

guide that before granting leave to appeal on such a point, the court must be satisfied that the adjudication on of the point is for the public good or so novel that it engages the wider public interest.

Our decision in **ZCCM Investment Holdings PLC v First Quantum Minerals Limited & Others Application** ⁽⁵⁾ was called in aid where we stated that:

“The Bidvest Case emphasizes the role of the Court of Appeal as a filter whose purpose is to ensure that only deserving cases progress to the Supreme Court on appeal. On matters of public interest, the Supreme Court will perform such tasks as interpreting or reviewing extraordinary, novel and new legal provisions informing actions of public authorities, or where a significant part of the public stands to be informed and guided by the court’s interpretation, so that there is public interest in the outcome of the appeal.”

It was contended that the applicant’s point of argument and what he assumes to be a point of law of public importance is what he termed as a ‘misapprehension of the facts’ by the trial judge. It was submitted that there is nothing novel or extraordinary in the applicant’s arguments as they are the same arguments which were presented in the appeal which this court heard and determined. That it is very clear from the affidavit and arguments in support that the

applicant only seeks to assail this court's judgment without raising any novel, extraordinary or new legal provisions which would require the attention of the Supreme Court.

As regards the issue of costs awarded to both respondents, the 1st respondent urged us to follow our decision in **Abishek Vijaykumar Patel v Henry Sampa & Bia Zambia Limited** ⁽⁶⁾ where we dismissed the application for failure to satisfy the provisions of **Section 13 of the CAA**. We were urged to dismiss the application with costs to the 1st respondent for lack of merit.

We have considered the application before us, the affidavits and skeleton arguments filed herein. At the hearing we granted the amendment sought to amend the cause number to reflect as Appeal 188/2020. We will not address the issue having granted the application.

As regards the application for leave to appeal, the applicant submits that leave should be granted because the appeal raises points of law of public importance, and has merit and good prospects of success.

As regards the grant of leave to appeal to the Supreme Court,

Section 13(3) of the CAA provides as follows:

13 (3) The Court may grant leave to appeal where it considers that—

- (a) the appeal raises a point of law of public importance;**
- (b) it is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court;**
- (c) the appeal would have a reasonable prospect of success; or**
- (d) there is some other compelling reason for the appeal to be heard.**

In **Bidvest Foods Zambia Limited & Others v CAA Import & Export Limited** ⁽³⁾, the Supreme Court considered what amounts to a point of law of public importance and endorsed the reasoning of the single judge in **Kekelwa Samuel Kongwa v Meamui Georgina Kongwa** ⁽⁷⁾ that:

“... for a legal question to be treated as a point of law of public importance, it must have a public or general character rather than one that merely affects the private rights or interests of the parties to a particular dispute. The legal point in issue should relate to a widespread concern in the body politic the determination of which should naturally have effect beyond the private interests of the parties to the appeal.”

The Court went on to hold that:

“It should be clear that an appeal that is anchored on findings of fact alone, even if it can be demonstrated that those findings were perverse or not borne out of the evidence, does not qualify as ‘raising a point of law’ in the first instance unless it can be shown that the specific finding of fact had also become a question of law ... An ordinary find of fact ipso facto fails the test on that account alone. Yet this can naturally apply only where a point of law and a point of fact are distinguishable and separate, but will not where a hybrid situation of some law and some facts are intrinsically interwoven.”

In the motion before us, as regards the point of law of public importance, it has been argued that we misapprehended the facts as the order made by the judge in the court below does not meet the requirements of the law for an order for directions; that the applicant did not make the entries in the lands register and that we overlooked the fact that the applicant is innocent of fraud and that the 2nd respondent did not give the particulars of fraud. That these issues raise a point of law of public importance.

In view of the guidance of the Supreme Court, we take the view that the issues raised by the applicant do not amount to a legal question to be treated as points of law of public importance. The issues raised by the applicant do not have a public or general character, but merely affect the private interests of the parties herein.

Further, a perusal of the affidavit in support, shows that beside the issue of what amounts to an order for directions, the intended appeal is anchored on findings of fact as regards the entries in the lands register. In any case, it has not been shown that our findings of fact have also become a question of law to warrant the grant of leave to appeal.

With respect to pleadings where fraud is alleged in a matter such as this, we properly guided ourselves on the applicable law taking into account the originating process, affidavits and evidence-in-chief.

As for the award of costs, it cannot be over-emphasised that these are in the discretion of the court, whether or not a party files documents or contests an appeal. In exercising its discretion whether or not to award costs, a court takes into consideration various factors including but not limited to the non-appearance of a party, the conduct of the parties during trial and the nature of the matter.

We have also perused the intended grounds of appeal, aside from not raising any issues of law of public importance, we do not find any compelling reason for the intended appeal to be heard or

- that the appeal has reasonable prospects of success. This is because
- a reading of our judgment shows that we addressed our minds to all the issues raised by the applicant herein.

It is our considered view, that the applicant is merely unhappy with our decision and thus trying to assail the same to arrive at a different outcome favourable to him.

We find no merit in the application for leave to appeal to the Supreme Court. It follows that the application for stay of execution falls away as it is predicated on the motion for leave to appeal.

The motion for leave to appeal is accordingly dismissed with costs to the 1st respondent.



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F. M. Chishimba

COURT OF APPEAL JUDGE



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D. L. Y. Sichinga, SC

COURT OF APPEAL JUDGE



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A. M. Banda-Bobo

COURT OF APPEAL JUDGE