

**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL No. 248/2021**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN:**

**CASHFIN ZAMBIA LIMITED**

**APPELLANT**

**AND**

**JASON JACK ROBERT KOMBO**

**1<sup>ST</sup> RESPONDENT**

**DINGISWAYO NDHLOVU**

**2<sup>ND</sup> RESPONDENT**

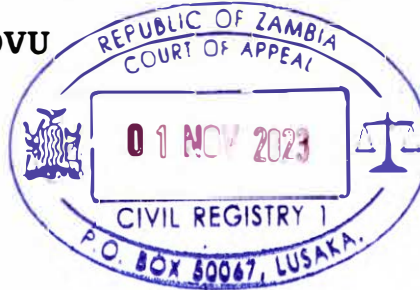
**REMMY MUSONDA**

**3<sup>RD</sup> RESPONDENT**

**LASTON MUMBA**

**4<sup>TH</sup> RESPONDENT**

**AND**



**JOSEPH CHILINDA**

**1<sup>ST</sup> INTERESTED PARTY**

**COMVEX EQUITY LIMITED**

**2<sup>ND</sup> INTERESTED PARTY**

**STANBIC BANK ZAMBIA LIMITED**

**3<sup>RD</sup> INTERESTED PARTY**

**Coram: Siavwapa JP, Chashi and Banda-Bobo, JJA**

**On 14<sup>th</sup> June 2022 and 1<sup>st</sup> November, 2023.**

**For the Appellant : Mr. W. Muhanga of Messrs. A.K.M Legal Practitioners**

**For the 1<sup>st</sup> to 4<sup>th</sup> Respondents: N/A**

**For the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties: N/A**

**For the 3<sup>rd</sup> Interested Party: Ms. J.R Mutemi of Theotis Mutemi Legal Practitioners**

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**JUDGMENT**

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***BANDA-BOBO, JA, delivered the Judgment of the Court***

### **Cases referred to:**

1. *Rosemary Chibwe v Austin Chibwe (2001) ZR 1*
2. *Hu He Rong v Charity Oparaocha SCZ Appeal 111/2000*
3. *The Minister of Home affairs, A.G v Lee Habasonda and Others (2000) Z.R 207*
4. *Georgina Mutale (T/A G.M Manufacturers Limited) v Zambia National Building Society (2002) ZR 19*
5. *Mike Hamusonda Mweemba v Kamfwa Obote Kasongo and Others (2006) ZR 101*
6. *Finance Bank Zambia Limited and 4 Others v Zambezi Portland Cement Limited SCZ Appeal 144 of 2015*
7. *Baxy Pharmaceuticals Manufacturing Company Limited and Anor v Sanmukh Ramanlal Patel and Another CAZ Appeal No 182 of 2018*
8. *Standard Chartered Bank Zambia Plc v Wisdom Chanda and Another SCZ Appeal No 18 of 2014*
9. *YB and F Transport Limited v Supersonic Motors Limited SCZ Judgment No 3 of 2000*

### **Legislation and Other Works referred to:**

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Companies Act No 2 of 2017*
3. *The Rules of the Supreme Court (1999) White book*

## **1.0 INTRODUCTION**

1.1 This appeal emanates from a ruling delivered by Honourable Mr Justice K. Limbani on 30<sup>th</sup> April 2021.

1.2 By that ruling, the Appellant's preliminary issues relating, *inter alia*, to the Appellant's *locus standi* in this matter were dismissed.

## **2.0 BACKGROUND**

- 2.1 The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties are registered as shareholders of the Appellant Company with 95% and 5% shareholding, respectively.
- 2.2 Following an alleged share purchase agreement between the parties, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties surrendered the original copies of the Appellant's certificate of incorporation, certificate of share capital and license to buy, distribute and export petroleum products.
- 2.3 The 1<sup>st</sup> Interested party further signed a mandate for the 2<sup>nd</sup> Respondent to be the sole signatory on all the Appellant's accounts held with the 3<sup>rd</sup> Interested Party.
- 2.4 Subsequently, the 2<sup>nd</sup> Respondent was denied access to one of the Appellant's accounts held at the Ndola Branch of the 3<sup>rd</sup> Interested party. This was because the 1<sup>st</sup> Interested party had instructed the 3<sup>rd</sup> Interested Party to change signatories on that account.

2.5 Displeased with the decision, the Respondents commenced an action in the Court below claiming the following reliefs:

- I. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the rightful shareholders of the Appellant.
- II. An order to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties to execute deeds of transfer of the shares in the Appellant to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
- III. In default of the above, an order that the Registrar of the High Court executes share transfers in the Appellant on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
- IV. An injunction restraining the Interested Parties and each of them, either through their agents, employees or servants from interfering with the operations of the Appellant in any manner whatsoever.
- V. Any further or other relief which may seem just and equitable to the Honorable Court; and
- VI. Costs of and incidental to this application

### **3.0 PRELIMINARY APPLICATIONS**

- 3.1 This appeal ensued from the decisions on the following applications.
- 3.2 Before the matter could proceed to trial, on 29<sup>th</sup> September, 2020, the 3<sup>rd</sup> Interested Party sought an order to set aside service on the ground that the party cited as 3<sup>rd</sup> Defendant on the Court process was 'Stanbic Zambia Limited' while its name is 'Stanbic Bank Zambia Limited'.
- 3.3 The Respondents opposed the application and argued that the spelling of the name was merely an error that could be corrected by an order of the Court.
- 3.4 In a ruling dated 20<sup>th</sup> November 2020, the learned Judge found that the error by the Respondents did not warrant an aggressive remedy of striking out the proceedings. He therefore ordered that the Respondents take necessary steps to correct the Court process.

- 3.5 On 15<sup>th</sup> September 2020, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties raised two preliminary issues pursuant to **Order 14A of the Rules of the Supreme Court of England<sup>1</sup>**.
- 3.6 The first issue was that the writ of summons filed by the Respondents was neither accompanied by a letter of demand as required under **Rule 4(1)(d) of the High Court (Amendment) Rules 2020<sup>1</sup>** nor served on their Advocates.
- 3.7 Secondly, that the Appellant does not have *locus standi* in this matter independent of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.
- 3.8 On 30<sup>th</sup> September, 2020, the Appellant, pursuant to **Order 14A Rule 1 and Order 33 Rule 3 of the Rules of the Supreme Court of England<sup>3</sup>**, also raised four preliminary issues.
- 3.9 The crux of those issues was whether the Appellant could commence proceedings and a lawyer could represent it without a resolution of its shareholders. Ultimately, the Appellant sought to be removed from the proceedings.

3.10 In opposition, the Respondents argued that following the sale of shares, they were the beneficial owners of the Appellant and had duly appointed Counsel for the Appellant Company.

#### **4.0 RULING OF THE COURT BELOW**

4.1 The learned Judge delivered a composite ruling on all the preliminary issues raised.

4.2 In relation to the letter of demand, the learned Judge found that it had been issued and served on the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties' Advocates on 2<sup>nd</sup> September, 2020.

4.2 As regards the issue of *locus standi*, the learned Judge found that the Respondents, following the ruling dated 20<sup>th</sup> November 2020, had sought leave to amend court process which was granted.

4.3 The learned Judge therefore, found that the Respondents had amended the court process by citing the Appellant, who was the 5<sup>th</sup> Plaintiff, as 3<sup>rd</sup> Defendant rendering the issue raised *otiose*.

4.4 Consequently, the learned Judge dismissed all the preliminary issues.

## **5.0 THE APPEAL**

5.1 Disappointed by the ruling, the Appellant has appealed to this Court on four grounds as follows:

1. The learned Judge in the Court below erred and misdirected himself in law and fact by his Ruling when he dismissed the Appellant's Preliminary issues raised before him and filed on 30<sup>th</sup> September, 2020 on the basis that the said issues had become academic without determining them on their merits.
2. The learned Judge in the Court below erred and misdirected himself in law and fact by his Ruling when he made findings of fact by referring to his earlier ruling dated 20<sup>th</sup> November, 2020 when the said ruling had no such facts and or findings and that the entire record before Court had no such facts relating to the amendment of the Writ and Statement of Claim.



3. That part of the Court proceedings leading up to the said Ruling appealed against were flawed and or irregular
4. The learned Judge erred in law and fact when he failed to order the respective Respondents to which the Preliminary issues related to pay costs at the time to the now Appellant

## **6.0 APPELLANT'S ARGUMENTS ON APPEAL**

6.1 In support of grounds one and two, Counsel for the Appellant submitted that the matter in the Court below was riddled with the following irregularities:

- a. The Court making decisions without being moved
- b. The Court making amendments to documents without being moved
- c. Failure to give reasons in the Rulings
- d. Reference to non-existent facts in the record

6.2 Counsel argued that the learned Judge failed to adjudicate upon the issues presented to him by the parties and declared them academic, which was strange because the

Court process had not been amended at the time of the ruling.

6.3 In relation to the Court making decisions and amendments without being moved, Counsel argued that the learned Judge referred to an application being made to amend originating process after the ruling dated 20<sup>th</sup> November, 2020, when no such application was made or granted.

6.4 Further, Counsel asserted that the ruling of 20<sup>th</sup> November, 2020 did not address any issue relating to the Appellant's capacity in the proceedings. Counsel drew our attention to page R8 of the Ruling dated 20<sup>th</sup> November, 2020 and argued that the ruling related to an application by the 3<sup>rd</sup> Interested party, for an order to set aside service of the originating process.

6.5 Counsel submitted that the ruling merely recognised the importance of giving the Respondents an opportunity to take steps to correct the process and did not give a directive to amend the originating process.

- 6.6 According to Counsel, the Respondents, following the learned Judge's ruling of 30<sup>th</sup> April, 2021 and without making an application to amend, proceeded to file amended process on 21<sup>st</sup> May, 2021.
- 6.7 Counsel contended that the amendment was done retrospectively to reflect the amendments referred to by the learned Judge in his ruling. It was submitted that the amended process substituted the Appellant, who was a Plaintiff as 3<sup>rd</sup> Defendant and changed 'Stanbic Zambia Limited' to 'Stanbic Bank Zambia Limited', purportedly, with leave of Court. Additionally, the 2<sup>nd</sup> Interested Party who was sued as 3<sup>rd</sup> Defendant was made the 4<sup>th</sup> Defendant.
- 6.8 Counsel submitted that the learned Judge failed to give reasons for any of his findings in the ruling. The cases of **Rosemary Chibwe v Austin Chibwe**<sup>1</sup>, **Hu He Rong v Charity Oparaocha**<sup>2</sup> and **The Minister of Home affairs, A.G v Lee Habasonda and Others**<sup>3</sup>, *inter alia*, were relied on in this respect.

- 6.9 Under ground three, the argument is that the proceedings in the Court below were riddled with irregularities. To support this assertion, various applications and orders relating to injunctions made during the proceedings were set out for us.
- 6.10 In ground four, Counsel averred that the preliminary issues raised by the Appellant ought to have been successful with costs.
- 6.11 The case of **Georgina Mutale (T/A G.M Manufacturers Limited) v Zambia National Building Society<sup>4</sup>** was cited to argue that the discretion to deprive a successful party of his costs must be exercised judicially.
- 6.12 We were urged to award costs to the Appellant in this Court and below.

## **7.0 AT THE HEARING**

- 7.1 At the hearing, Mr. Muhanga, Counsel for the Appellant relied on the Appellant's heads of argument filed on 15<sup>th</sup> October, 2021.

- 7.2 There was no appearance from the Respondents and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. Further, they filed no arguments in opposition.
- 7.3 Ms. Mutemi, Counsel for the 3<sup>rd</sup> Interested Party, submitted oral arguments. She argued that the findings of the Court below at pages 27 and 28 of the record of appeal are not supported by the evidence on record.
- 7.4 Counsel asserted that there was no application by the Respondents to substitute the Appellant herein from being the 5<sup>th</sup> Plaintiff to become the 3<sup>rd</sup> Defendant.
- 7.5 In relation to the application to amend, Counsel contended that the only application to amend filed by the Respondents appears at page 39 of the record of Appeal and a review of the draft originating process at page 90 shows that the capacity of the 5<sup>th</sup> Plaintiff was not an issue.
- 7.6 Counsel argued that the 3<sup>rd</sup> Interested Party was sued as 3<sup>rd</sup> Defendant and there was no leave of Court to substitute parties. She submitted that it was wrong to conclude that

the preliminary issue had been overtaken by an amendment which had not been granted.

## **8.0 ANALYSIS AND DECISION**

8.1 We have carefully considered the record of appeal as well as the arguments proffered by the Appellant and 3<sup>rd</sup> Interested Party.

8.2 Considering that the Appellant has relied on the same arguments in grounds one and two, we propose to deal with these grounds together.

8.3 The gist of the arguments under the said grounds is that the learned Judge, relying on facts that were not on record, failed to determine the issues before him and found that they had been overtaken by events.

8.4 To recap, the Appellant applied to be struck out from the action on grounds that there had been no resolution to commence the action on its behalf and that it had not appointed the advocates on record.

8.5 Considering the arguments before him, the learned Judge stated thus at page R9 of his ruling:

**“On the issue of locus standi and the issues raised by the 5<sup>th</sup> Plaintiff, I take notice that following the ruling in the case *in casu* of 20<sup>th</sup> November 2020, the 3<sup>rd</sup> Plaintiffs sought leave to amend the process which was granted. They then amended the court process whereby, among others, the 5<sup>th</sup> Plaintiff was substituted and made 3<sup>rd</sup> Defendant which in effect makes the other issues raised in the preliminary applications academic.”**

8.6 The learned Judge went on to state, citing the case of **Mike Hamusonda Mweemba v Kamfwa Obote Kasongo and Others<sup>5</sup>**, that all parties that may be affected by the cause of action be joined to the proceedings.

8.7 Our examination of the ruling of 20<sup>th</sup> November, 2020 discloses that the subject matter of the ruling was the Respondents’ misnaming of the 3<sup>rd</sup> Interested Party. The learned Judge was of the view that this was an error that could be amended. He therefore allowed the Respondents to take steps to correct the process.

8.8 According to the learned Judge, the Respondents subsequently effected these amendments and further removed the Appellant as 5<sup>th</sup> Plaintiff and made it the 3<sup>rd</sup> Defendant.

8.9 We have perused the record of appeal and contrary to the learned Judge's findings, the only application for amendment made by the Respondents is dated 25<sup>th</sup> September, 2020, appearing at page 89 of the record.

8.10 We agree with Counsel for the 3<sup>rd</sup> Interested Party that this application related to pertinent facts and claims that the Respondents sought to include in the statement of claim and writ of summons. The draft process exhibited as 'RM2' and 'RM3' at pages 95 and 97 of the record of appeal confirm that the capacity of the Appellant was not an issue in the application.

8.11 Further, we note, at page 137 of the record, that the process that amended the status of the Appellant was only filed on 21<sup>st</sup> May, 2021 long after the ruling dated 30<sup>th</sup> April, 2021.



- 8.12 We therefore find that the amended writ of summons and statement of claim did not exist on the record at the time the learned Judge delivered his ruling of 30<sup>th</sup> April, 2021.
- 8.13 Considering the foregoing, we further find that the learned Judge's reliance on these facts, in his ruling, was a misdirection. We accordingly set it aside.
- 8.14 Given that we have all the process and arguments filed in the Court below, we will proceed to determine the issues *in limine*.
- 8.15 As earlier set out, the issues raised were that the Appellant should not have been a Plaintiff in the court below because there was no resolution made by the shareholders to sue and to instruct Counsel.
- 8.16 In the case of **Finance Bank Zambia Limited and 4 Others v Zambezi Portland Cement Limited**<sup>6</sup>, the Supreme Court guided, following the enactment of the **Companies Act**, that it is no longer valid to argue that a writ had been issued without a resolution of the company and that third parties

are not expected to be aware of the indoor management of a company.

8.17 In the Court of Appeal case of **Baxy Pharmaceuticals Manufacturing Company Limited and Anor v Sanmukh Ramanlal Patel and Another**<sup>7</sup>, we affirmed this position of law with regard to the provisions of the **Companies Act No 2 of 2017**<sup>2</sup>.

8.18 Further, we noted that where a third party had actual knowledge of the irregularity or deficiency in authority, or if the circumstances surrounding the contract or transaction are suspicious, which ought to have put the third party on notice to inquire into the actual authority, the provisions cannot be relied on.

8.19 In the present circumstances, the statement of claim prepared by Isaac and Partners appearing at pages 32 to 35 of the record shows that the Respondents are seeking a deed of transfer of shares in the Appellant.

8.20 In our view, this indicates that Isaac and Partners who were privy to these facts had knowledge that the Respondents, who had instructed them, were not the registered shareholders of the Appellant at the time of commencing the action. This ought to have put them on notice as to whether they were receiving instructions from parties that had authority to issue them.

8.21 In the premises, we find that the Advocates who acted for the Appellant in the Court below did not have authority to commence an action on its behalf.

8.22 Grounds one and two accordingly succeed.

8.23 Now, we must state, even though the parties continue to address this as an issue of amendment, we opine that it relates to joinder and misjoinder.

8.24 This is because the effect of the purported amendment made by the Respondents was to strike out the Appellant and join it to the action as a Defendant.

- 8.25 As rightly observed by the learned Judge in the impugned ruling, all parties that may be affected by a cause of action should be joined to proceedings. This is to ensure every aspect of the suit and every matter in controversy is determined in finality. The **Mike Hamusonda case**<sup>5</sup> refers.
- 8.26 We therefore opine that the Appellant should be part of the proceedings in the Court below.
- 8.27 In relation to any other amendments, it was guided by the Supreme Court in the case of **Standard Chartered Bank Zambia Plc v Wisdom Chanda and Another**<sup>8</sup>, that a party concerned must take out an appropriate application seeking to cure a defect as the Court has no mandate to choose to ignore the defect and of its own motion to proceed as if the defect never existed.
- 8.28 Moving on to ground three, the notice of appeal and memorandum of appeal appearing at pages 4 and 6 of the record shows that this appeal is against the ruling dated 30<sup>th</sup> April, 2021.

8.29 Considering that it only appealed that ruling, it cannot then seek to impugn other orders of the Court not appealed against as our jurisdiction relates to the ruling for which leave was granted.

8.30 Ground three therefore lacks merit.

8.31 What remains is the issue of costs. In ground four, Counsel argues that the Appellant was entitled to costs for this application.

8.32 In the case of **YB and F Transport Limited v Supersonic Motors Limited**<sup>9</sup> the Supreme Court held as follows:

**“The general principle is that costs follow the event, in other words a successful party should normally not be deprived of the costs, unless the successful party did something wrong in the action or in the conduct of it.”**

8.33 The Appellant having been successful; they are entitled to costs in this Court and below.

## **9.0 CONCLUSION**

9.1 For completeness, the following are our orders:

- a) The matter reverts to the High Court for orders for direction before another Judge.
- b) The Appellant be struck off the writ and joined to the matter as 3<sup>rd</sup> Defendant.
- c) The Respondents shall attend to curing any defects on the Court Process within 30 days.
- d) Costs are for the Appellant both in this Court and below to be taxed in default of agreement.

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**M. J. SIAVWAPA**  
**JUDGE PRESIDENT**

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

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**A. M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**