

ARTHUR NELSON NDHLOVU, DR.JACOB MUMBI MWANZA AND ALSHMS BUILDING MATERIALS COMPANY LIMITED, JAYESH SHAH

SUPREME COURT
LEWANIKA, DCJ, CHAILA, JS, AND MAMBILIMA, JS
17TH JULY, 2001 AND 13TH MAY, 2002
(SCZ JUDGMENT No. 12)

Flynote:

Preliminary issue - section 123 Banking and Financial Services - contempt proceedings

Headnote:

Respondents sued First Merchant Bank Ltd. (in liquidation) and the Attorney General claiming money held by bank in dollar account in the sum of US\$1, 013, 976.91. Money in account was seized by the DEC and respondents not allowed to access money. High Court found in favour of the respondents. Money placed in suspense account was no longer part of the general depositor's account and could not be used by either bank or respondents. Bank and Attorney General did not comply with court order to pay money into court. In course of contempt proceedings appellants raise preliminary issue of immunity under section 123 of the Banking and Financial Services Act. 5 grounds of appeal were raised in this case.

Held:

(i) Against the appellant, you cannot claim immunity under section 123 of the Banking and Financial Services Act to disobey courts orders.

(ii) Committal of a company for contempt proceed by way of sequestration.

(iii) There can be no estoppel against the statute.

Appeal partly allowed.

Cases and Authorities referred to:-

- (1) Administrative law: By H.R.W. Wade, 5th Edition Page 91.
- (2) Zambia National Holdings Limited & Another vs The Attorney-General [1993-94] Zambia Law Reports 115.
- (3) Krige and Another vs Christian Council of Zambia [1975] Zambia Law Reports 152 at page 159.

Legislation referred to:-

- (1) The Banking and Financial Services Act, Cap. 387 of the Laws of Zambia.

For the Appellants – Mr. D. Bukali Mr. M. Munsashi of Mulenga, Mundashi and Company and; Mr. A. M. Wood of A.M. Wood & Company.

For the 1st Respondent- Mr. C. K. Banda SC,
Chifumu Banda and Associates.
Mr. S. Sikota of Central Chambers
Ms. A. D. L. Mumba of Mopani Chambers.

For the 2nd Respondent- In Person.

Judgment

MAMBILIMA JS, delivered the Judgment of the Court.

We heard this appeal together with our brother, Chaila JS, before he died. This Judgment should be taken as the majority decision of the Court.

This is an appeal against the decision of the court below given on 13th November 2000, refusing to entertain or uphold a Preliminary issue raised by the appellants based on section 123 of the Banking and Financial Services Act (1). The background of this case is that the Respondent sued First Merchant Bank Limited (in liquidation) (hereinafter referred to as the Bank) and the Attorney-General in the Court below claiming a sum of US\$1,013,973.91. This money was held by the Bank in a dollar account belonging to the respondents. They were informed that the Account had been seized on orders from the Drug Enforcement Commission. As a result, the Respondent was not allowed access to the money. They sued the Bank and the Attorney-General contending that the seizure of their money was illegal. The High court found in their favour and ordered the bank and the Attorney-General to return the money to the Respondent together with interest at the dollar lending rate. The Bank appealed to the Supreme Court against the Judgment of the High Court and this Court upheld the judgment of the High Court that the seizure of the Respondent's money was unlawful and illegal. This Court further stated that the money having been placed in a Suspense Account, was no longer part of the general depositors' account and could not be used either by the Bank or the Respondents.

Pending the hearing of the appeal to the Supreme court, the Respondents had applied to the High court that the Judgment sum be paid into court. The court granted the application. The Bank and the Attorney-General, however, did not comply with the order to pay into court prompting the Respondents to institute contempt proceedings. It was in the course of these proceedings that the appellants were cited for contempt. The respondent sought to have them committed for contempt on the ground that they had failed to honour the court order to pay the judgment debt into court. The 1st appellant is the liquidation Co-ordinator of the Bank having been appointed by the Bank of Zambia under the Banking and Financial Services Act, and the 2nd Appellant was the Governor of the Bank of Zambia, who are the Liquidators of the Bank.

In the course of the hearing of the contempt proceedings, the Appellants raised a preliminary issue arguing that under Section 123 of the Banking and Financial Services Act, (hereinafter referred to as "the act"), they are immune from proceedings with regard to acts done in the performance of their duties under the Act. The Learned Trial Judge in his Ruling observed that the preliminary issue raised by the Appellant was an untimely objection. He went on to state that the question of bad faith was the key question to be resolved in the proceedings in that "if the conduct of Bank of Zambia officers which is the subject of the proceedings is shown to have been in good faith, then the complaint before the court will be decided accordingly and vice versa". He went on to state that Section 123 of the Act does not protect the officers against Judgments and Orders of the Court which go against their institutions. The objection was on this premise over-ruled.

Before this Court, the Appellants have advanced five grounds of appeal namely:

“1. The Learned Judge erred and misdirected himself in law when he did not construe or interpret or understand Section 123 of the Banking and Financial Services Act Cap. 387 of the Laws of Zambia as effectively immunizing officers or persons employed by the Bank of Zambia or any other person who exercises or performs or purport to exercise or perform any power or function under Cap 387 in good faith from any action, claim, liability, suit or demand.

1. Further on in the alternative to ground 1, the learned Judge erred when he failed to construe or interpret or understand the meaning and effect of the said Section 123 as requiring mandatory proof of bad faith on the part of an officer, or person employed by the Bank of Zambia to exercise or perform or purport to exercise or perform any power or function before any action, claim, liability, suit or demand can arise against the officer or person concerned.

2. The Learned Judge erred and misdirected himself at law when he appeared to have taken a position in his Ruling that he could properly or competently entertain committal proceedings for contempt of court which had been launched without prior establishment of bad faith on the part of both Dr. Jacob Mwanza said proceedings.

3. The Learned Judge erred when he appeared to have taken the view in his Ruling that Section 123 of Cap 387 does not effectively protect officers of the Bank of Zambia or other persons employed by the Bank of Zambia who exercise any power or perform any function under Cap 387 against Court Judgments or orders or against enforcement proceedings in respect thereof if the said Judgments or Orders or proceedings are not preceded by clear proof that the officers or persons concerned had acted in bad faith in the exercise of the subject powers or performance of the subject functions.

4. The Learned Judge in the court below erred in law when he dismissed the preliminary point of law raised by the Appellants based on Section 123 of the Banking and Financial Services Act on the basis that the same had been raised belatedly and in the thick of proceedings and constituted an untimely objection.

Grounds one to four were argued together. According to Appellants, the main thrust of this appeal centres on the interpretation of Section 123 of the act, that is, whether or not this Section affords an immunity to the appellants from any claim, liability, suit or demand. The appellant contend that as a matter of law, they are entitled to immunity under section 123 of the act for all powers or functions captured by the Act. It was therefore wrong for the court below to have entertained the contempt proceedings against them. The appellants further argued that on the wording of section 123, it is imperative that before instituting a suit, claim or demand against an officer or person who exercises or performs any function under the Act, the issue as to whether there was bad faith or lack of good faith should be resolved because for as long as an act, matter, or thing done by an officer of the Bank of Zambia under the Act is not shown or proved to be in bad faith, then that act, matter, or thing done does not give rise to any claim, liability, suit or demand. Counsels for the Appellants have referred us to a number of authorities in a bid to define the phrase “good faith”.

One such authority is Professor H. W. R Wades’ book on Administrative Law (1) in which he states:

“Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context in good faith means merely “for legitimate reasons” contrary to the natural sense of the words, they impose no moral obligation.

Counsels have also referred us to our decision in the case of **Zambia National Holdings Limited & Another vs The Attorney-General (2)** in which we stated that “there was no dispute on the law that the exercise of statutory powers could be challenged if based on bad faith or some other arbitrary capricious or ulterior ground not supportable within the enabling power.”

The appellants further argued that the court below, in construing section 123 of the act not to have immunized the appellants against the orders of the court that go against their institutions, failed to understand the nature and purpose of the Section which by its plain terms, sought to protect officers of the Bank of Zambia and other persons concerned. They pointed out that the appellants have been sued by virtue of the fact that they administered and implemented the provisions of the act. They urge the court to adopt a literal interpretation of section 123 as this will bring out the sense and justice of the appeal before the court. According to the Appellants, the natural and proper meaning of Section 123 is that persons concerned are immunized or protected and that immunity or protection is only lost when faith or lack of good faith is proved. Any other construction of Section 123 would lead to manifest absurdity.

Mr. Bukali for the Appellant submitted before us that the Bank in this case was insolvent and the First Appellant in his capacity as Liquidation Manager attempted to trace the Respondent's money but failed. According to Mr. Bukali, there was no bad faith on the part of the Appellants because they did what was required of them and failed to trace the money. He also emphasized that there should have been separate proceedings to prove bad faith.

On ground five, the appellants argued that the court's Ruling that the preliminary objection was raised belatedly and in the thick of proceedings amounted to setting up an estoppel against the appellants' statutory rights under section 123 of the Act. According to the Appellants, the Ruling of the court below was in effect that the preliminary objection could not be entertained because it has been raised late. They argue that this was an error because there can be no estoppel to a statute. We have been referred to a number of authorities for the proposition that one cannot set up estoppel against a Statute. One such authority is our decision in the case of *Krige and Another vs Christian Council of Zambia (3)* in which Baron, DC stated:

“As to estoppel, the matter is in my view concluded against the Plaintiff by the Plaintiff by the Principle that one cannot set up an estoppel against a Statute and I entertain no doubt that the same rule applies whether the basis upon which a party is alleged to be precluded from relying on the particular state of affairs is estopped properly so called or some analogous principle or 'quasi-estoppel'.

Arguing for the First Respondent, Mr. Banda submitted that if a party fails to honour an order to pay into court, the inference is that there is a willful disobedience. Contempt proceedings were instituted to compel the contemnor to obey the High Court Judgment. He went on to state that the court in this case ordered that the Respondent be treated preferentially and not as unsecured creditors. Notwithstanding this Judgment, there was flagrant disregard of the Court Order in that the appellants went ahead to place an advert in the newspaper seven days after the High Court decision offering to pay Depositors of the Bank. No attempt was made to comply with the High Court Order. This failure to honour an order of the court is prima facie contempt. On the plea of immunity under section 123 of the Act, Mr. Banda submitted that this plea is misconceived. He points out that section 123 does not cover an omission. The act specifically refers to an “act, matter, or thing done.” According to Mr. Banda, the Officers in this case did nothing. He went on to state that under section 104(3) of the Act, the relationship between the respondent and the Bank was fiduciary. He urged the court to construe section 104(3) of the Act strictly against the Bank of Zambia and in favour of individuals. Mr. Banda

further submitted that the requirement to pay the Judgment debt was independent irrespective of the provisions of the Act. According to Mr. Banda, section 123 of the Act does not apply to this case and it does not give immunity to Officers who act in bad faith. The claim for immunity was therefore an after thought and ill advised.

Mr. Sikota in his submissions submitted that section 123 of the Act does not support the position that there must be a prior action before any action is brought to determine whether there is bad faith. According to Mr. Sikot, the Trial Judge investigated the issue of bad faith and found that one cannot disregard a court order and claim immunity. He went on to state that obeying Court Orders is beyond Section 123 of the Act. Mr. Sikota further submitted that contempt proceedings by their nature require that the appellants show cause why they should not be punished for contempt. In this case, there was no Statutory power that the appellants were being stopped from exercising.

The 2nd Respondent in his submissions states that Section 123 of the Act does not allow officers and employees of the Bank of Zambia unfettered licences to disregard responsibilities placed upon them and abuse their power with impunity. He has referred us to section 3 of the act which, according to him, binds the Bank of Zambia in matters in which the Act imposes duty, power, or function on the Bank. He echoes the submission of Mr. Banda that the plea for immunity in this case is mis-conceived because the Appellants did not perform any act whatsoever. On the contrary, they declined to perform their Statutory duty. He also points out that the appellants further failed to perform their function in relation to the Respondent under section 104 (3) of the Act which mandates them to take all necessary steps to terminate all fiduciary functions performed by the Bank, and return all assets and property held by the Bank to the owner and settle its fiduciary account. According to the 2nd Respondent, it would be preposterous to contnt that the Bank may challenge a claim in court for the misfeasance or non-feasance of its officers, incur liability and then plead immunity in order to resist the enforcement of the judgment and an order to pay into court. Secondly, the 2nd Respondent argues that the contempt proveedings in the court below emanated from the Liquidators' failure to pay the money in Court as argue that he has, oris not given power by the Act to effect payment. Payment is to be effected irrespective of the Provisions of the act. Thirdly, the 2nd Respondent argues that the conduct of the Bank Officers in this respect is a deliberate defiance of the Order of the Court. He went on the state that despite the assertion that money cannot be straced, there is overwhelming evidence to the contrary. The 2nd Respondent further submits that the Appellants never applied for immunity at the commencement of the action or during the trial, thus waiving immunity if at all it existed.

We have anxiously considered the Ruling by the Judge in the court below and the eloquent submissions of the parties before us. It is common cause that the Respondents have a judgment in their favour under which the First Merchant Bank Limited (in Liquidation) and the Attorney-General were Ordered to pay to pay to them, a sum of US \$1,013, 973.91 which amount was seized from their dollar account which was maintained at the Bank. It is also common cause that pending the determination of the Bank's appeal to the supreme court, the high court ordered the Bank to pay the judgment sum into court. This was not done. The High court judgment was upheld on appeal. It goes without saying that with the dismissal of the appeal the amount now became payable to the respondents. The court ordered that the respondents should be paid their money in preference to all other creditors. This was not done.

According to page 19 of the Record of appeal, the High court ordered the Bank to pay the money into court on 1st June, 2000. The Respondent commenced contempt proceedings to which the appellants were added as contemnors. It is to these proceedings that the appellants pleaded the immunity envisaged by Section 123 of the Act.

It is clear from the wording of section 123 of the act that immunity under this section can only

be claimed for acts done in good faith. The appellants have forcefully argued that the issue of good faith or lack of it should be resolved before any suit, claim or demand against an officer or employee of the bank of Zambia is instituted. This implies a multiplicity of actions over the same facts. As we stated in our decision in the case of Development Bank of Zambia and KPMG Peat Marwick vs Sunvest Limited and Sun Pharmaceuticals (4); "We.....disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter." In our view, the question of whether or not an officer or an employee was acting in good faith is a matter to be resolved by the Court in the proceeding once a claim of immunity under the Act has been made. It will be up to the claimant of the immunity to prove that they were acting in good faith. We note from the Ruling of the Court below the Learned Trial Judge was alive to the key issue that immunity can only be claimed if the action in question was done in good faith. However, the Judge held that the protection offered by section 123 doesn't extend to judgments or orders of the Court.

The 1st appellant is the Liquidation co-ordinator of the First Merchant Bank (in Liquidation). He was appointed by the Bank of Zambia. He is directing the affairs of the Bank in accordance with the Act. In the performance of his duties, he can be directed by the court to proceed in a certain manner. A situation in point is that envisaged by section 107 1 (g), under which the court can determine the priority of claims. It is absurd to contemplate that a liquidator can plead immunity under section 123 to disobey such a court order. In our view, it could not have been the intention of the legislators to extend immunity to liquidators to disobey court judgments or orders under section 123 of the Act. As against the 1st Appellant, we uphold the learned Trial Judge that the protection in the act does not include protection against judgments or orders which go against the liquidators' institutions.

Coming to the 2nd Appellant, we note that he is being cited for contempt simply because he heads the Bank of Zambia which appointed the 1st Appellant. The Liquidation proceeds are actually being handled by the 1st Appellant. In our view, he cannot be cited for contempt simply because he heads the institution which appointed the Liquidator unless it can be proved that he ordered the liquidator not to pay. The Bank of Zambia is an artificial person which can be likened to a company. This being the case, an application for committal of a company may be misconceived since in most cases, contempt proceedings against a company proceed by way of sequestration. From the foregoing, we find that contempt proceedings against the 2nd Respondent purely by virtue of the fact he was the governor of the Bank of Zambia which appointed the Liquidator are misconceived.

The last ground of appeal is to the effect that the court below erred in law when it dismissed the preliminary point of law based on Section 123 of the Act on the ground that it was raised belatedly, in the thick of the proceedings and that it was an untimely objection. The Respondent did not reply to this ground in their submissions and the written heads of arguments. The position at law is clear. There can be no estoppel against a statute. A litigant can plead the benefit of a statute at any stage. It is clear from the Ruling of the court below however, that the decision of the court was based on its finding that the protection in section 123 of the Act does not include protection against judgments and orders which go against the Appellants' institutions.

From the foregoing, we dismiss the appeal by the 1st Appellant and allow that of the 2nd Appellants.

Costs shall be in the cause.
