

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 47 OF 2004

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

**LAWRENCE MUNENGO AND OTHERS**

APPELLANTS

AND

**GALCO ZAMBIA LTD (In Liquidation)**

RESPONDENT

**Coram: Sakala, C. J., Mambilima and Silomba, J. J. S.**

On the 5th November, 2003 and 2<sup>nd</sup> December, 2005.

For the appellants: Mr. H. Silweya of Messrs Silweya and Company

For the respondent: Mr. M. Mundashi of Messrs Mulenga Mundashi and Company.

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### **JUDGMENT**

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**SILOMBA, J. S., delivered the judgment of the court.**

**Case referred to:**

1. **N. B. Mbazima and Others, Joint Liquidators of ZIMCO (In liquidation) Vs. Reuben Vera SCZ Appeal No. 6 of 2001.**

From the outset, we wish to say that we deeply regret the delay in the delivery of this judgment, which delay has been due to circumstances beyond our control.

This appeal is against the ruling of a High Court Judge delivered on the 31<sup>st</sup> day of January, 2003. The ruling was based on affidavit evidence and the undisputed facts were that the respondent was placed in liquidation on the 5<sup>th</sup> of September, 2000; that prior to that the respondent was in receivership, during which time there was an action against it pending in the Industrial Relations Court (IRC) at the instance of the appellants.

The action was for redundancy payments after the appellants were declared redundant by the respondent while in receivership. Subsequent to the action, the appellants and the respondent (In receivership) executed a consent order on the 26<sup>th</sup> (or 17<sup>th</sup>) August, 1999 in which it was agreed to terminate the employment of the appellants with the respondent by reason of redundancy and pay them their redundancy packages in accordance with their conditions of service.

In addition to the consent order, the IRC held, in its long ruling of the 20<sup>th</sup> April, 2000, that Section 346(1)(d) of the Companies Act, in relation to workers' compensation under any written law, was a preferred debt and was to be ranked in priority to unsecured debts; that the Employment (Amendment) Act No. 15 of 1997 was one of 'any written law' envisaged by Section 346(1)(d) of the Companies Act.

It accordingly held that the appellants' redundancy benefits as per consent judgments of the 17<sup>th</sup> and 19<sup>th</sup> of August 1999 were workers' compensation under the Employment (Amendment) Act No. 15 of 1997. Pursuant to the order of the IRC, as contained in the aforesaid ruling, the learned Registrar of the IRC proceeded to make an assessment of what was due to the appellants on the 3<sup>rd</sup> of April, 2002.

The assessment was proceeded with despite the order to wind up the respondent being made on the 5<sup>th</sup> of September, 2000. Consequently, on the 31<sup>st</sup> of October, 2002 the liquidator of the respondent filed summons, pursuant to Section 326 of the Companies Act to seek the determination of the following issues, that is to say: -

- 1. whether proceedings that were commenced against the respondent before it was compulsorily liquidated by the court can be continued or stayed;**

2. **whether an order of priority of payment of debts made before the respondent went into liquidation binds the respondent, which has been put into compulsory liquidation by an order of the court;**
3. **the order of priority of payment of debts in a compulsory winding up; and**
4. **such other order or directions as the court shall deem fit.**

The learned trial judge considered the affidavit evidence, the oral and written submissions made by counsel and in her ruling of the 31<sup>st</sup> of January, 2003 she found, with regard to the first question posed, that in terms of Section 281 of the Companies Act an action commenced against a company that has been placed in liquidation could be continued or proceeded with only with the leave of the High Court; that since no leave was obtained the proceedings in the IRC were irregular and contrary to the law in Section 281 of the Companies Act.

On the order of priority of payment of a debt, as a second issue, the learned trial judge considered the liquidation rules and found that their effect and essence was that whatever debt a company owed prior to it being placed in liquidation and thereafter had to be proved and admitted into liquidation. She opined that an order of priority of payment made by the court prior to a winding up had to be proved and admitted into the liquidation since a winding-up order puts all proceedings, including court orders obtained before the winding-up, in abeyance.

On the third issue, she stated that only after such debts were admitted into liquidation could they be ranked in order of priority of payment by the liquidator and as far as she was concerned the debt arising from the ruling or order of the IRC was subject to the liquidation rules.

There are four grounds of appeal and these are as follows: -

- (i) The learned judge in the court below erred and misdirected herself in law in stating and deciding (at page R. 11) that Section 346 (1)(d) of Chapter 388 refers only to workers' compensation under the Workers' Compensation Act No. 10 of 1999 and not redundancy payments under Section 26B of the Employment Act No. 15 of 1997 as an example of "workers' compensation under the provisions in Section 346 (1)(d), Chapter 388 or any other written law;"
- (ii) While recognising the pararell jurisdiction of the IRC with the High Court, the learned judge erred and misdirected herself in law in deciding that Section 346 (1)(d) of Chapter 388 only refers to workers' compensation under the Workers Compensation Act No. 10 of 1999 when her attention had been drawn to the fact that there was on record an IRC ruling on the same point to the contrary and without an appeal against the ruling of the IRC by the respondent;
- (iii) The learned judge in the court below erred and misdirected herself in law and fact and failed to discover that the ranking and priorities of preferential debts are provided for under Section 346 (2)(b) of Chapter 388, which section was referred to in both the 1<sup>st</sup> appellants' affidavits and written submissions; and
- (iv) The court below erred and misdirected itself in stating that the parties did not obtain leave to proceed as required by Sections 281 and 296 of Chapter 388 because her refusal to stay the proceedings under Section 296 of Chapter 388 was appealed against and the case was no longer under her jurisdiction.

In his submission, Mr. Silweya, counsel for the appellants, relied on the filed heads of argument, which he augmented with oral arguments. In relation to ground one, Mr. Silweya submitted that the learned trial judge misdirected herself when she held that workers' compensation in Section 346 (1)(d) of the Companies Act was a reference to workers' compensation under the Workers' Compensation Act No. 10 of 1999.

He argued, among other things, that the phrase "workers' compensation" was generic in a sense and that if Parliament had intended to restrict the phrase to the compensation under the Workers' Compensation Act it would not have opened up to workers' compensation "in any other written law" but would have specifically enacted "workers' compensation under the Workers' Compensation Act" in Section 346 (1)(d) of the Companies Act.

On ground two, Mr. Silweya submitted, both in his written heads of argument and oral submission that that it was a misdirection to refer to the ruling of the IRC as if the directions sought by the liquidator were by way of an appeal to the learned trial judge from the ruling of the IRC when this was not. The submission by counsel was in reference to the view held by the learned trial judge that Section 346(1)(d) of the Companies Act referred to workers' compensation under the Workers Compensation Act No. 10 1999 for disability and not redundancy payment under Section 26B of the Employment (Amendment) Act No. 15 of 1997, a finding that ran contrary to the finding of the IRC.

With regard to ground three, it was pointed out that the ruling of the IRC at pages 28 to 40 of the record entitled the appellants to the ranking of their debt under Section 346 (2) of the Companies Act. Counsel submitted that it was a misdirection for the

learned trial judge to say that there was no need for the debt to be ranked as a preferential debt because there was no compensation payable. As far as counsel was concerned, the learned trial judge could not deal with the issue of jurisdiction of the IRC when there was no appeal to her court.

Finally, on ground four, counsel submitted that the learned trial judge should not have used the lack of leave to continue the proceedings in the IRC as a basis for nailing the appellants because she had already granted leave as a result of this court's judgment, which was at pages 78 to 79 of the record.

Mr. Mundashi, counsel for the respondent, relied entirely on the filed heads of argument and did not, therefore, make any oral submission. The written submission, in relation to ground one, is quite extensive but the gist of the submission was that the redundancy payments could not be termed to be "workers' compensation" as envisaged by Section 346 (1)(d) of the Companies Act because the only written law relating to workers' compensation in Zambia was the Workers Compensation Act No. 10 of 1999 and the Regulations made there-under.

On ground two, Mr. Mundashi submitted that the learned trial judge did not misdirect herself in referring to the ruling of the IRC because, according to counsel, the said ruling was passed at a time when the respondent was in receivership; that the issue before the learned trial judge touched on her jurisdiction as the person having conduct of the liquidation of the respondent pursuant to the powers vested in her by the provisions of the Companies Act.

On ground three, counsel submitted that the ruling of the IRC was passed at the time the respondent was in receivership and as such it could not bind the liquidator, a non

party to the action; that after the liquidation, it was proper for the liquidator to seek the direction of the learned trial judge on whether redundancy payments could be treated as workers' compensation under Section 346 (1)(d) of the Companies Act so as to determine the order of priority in the liquidation. Counsel relied on the case of *N. B. Mbazima and Others, Joint Liquidators of ZIMCO (In liquidation) Vs. Reuben Vera* to show that the IRC had no jurisdiction to determine the order of priority of payment of a debt in a winding-up.

Counsel's reaction to ground four was that the learned trial judge did not grant leave for the proceedings in the IRC to continue during the winding up of the respondent. In reference to the *ex parte* order of stay of winding up company at pages 78 and 79 of the record, counsel submitted that during the hearing of the petition to wind up the respondent the appellants opposed the petition on the basis that their separate action that was pending before the winding up would be prejudiced but the learned judge dismissed the application and proceeded to grant the order for winding up.

We have given our anxious consideration of the submissions, the evidence as contained in the record of appeal, as well as, the judgment of the learned trial judge. Before we deal with the appeal, we would like to look at the reliefs the liquidator sought. We have adopted this attitude because we feel that some of the issues discussed by the court below and raised in this appeal by the appellants are not related to the reliefs the liquidator sought.

By summons dated the 31<sup>st</sup> of October, 2002, the liquidator asked the learned trial judge three specific questions for her determination, which we have outlined in this judgment and it is not, therefore, part of our intention to repeat them here. The response

of the learned trial judge to each question is given in some detail in this judgment and it is not our intention to go through those findings again, except to state that we are in total agreement with the findings of the learned trial judge on those specific issues.

In this judgment, we have endeavoured to outline the grounds of appeal and the submissions in some detail just to demonstrate their irrelevance to the specific issues posed by the liquidator and the findings on those issues by the learned trial judge. In the process we have not appreciated the benefits the appellants intended to achieve through this appeal. In our view, the best option available to them, following the ruling, was not to appeal but to seize the opportunity and submit their claim, as assessed by the Registrar of the IRC, for approval and ranking or otherwise by the liquidator.

We wish now to deal with the specific issue of 'leave to proceed with the action in the IRC', which the appellants contended was sought and granted by the learned judge. After perusing the documents we were referred to, we are not convinced that the learned trial judge granted leave to the appellants for the action to proceed following the winding-up order of the respondent. We say so because the leave they are seeking to rely upon was obtained *ex parte* (see pages 78 and 79) without any further evidence that the said leave was confirmed at the subsequent *inter partes* hearing.

The appellants may have succeeded in showing that the learned trial judge went a bit too far in stating that a reference to workers' compensation under Section 346(1)(d) of the Companies Act was a reference to compensation under the Workers Compensation Act No. 10 of 1999 for disability and not redundancy payment under Section 26B of the Employment (Amendment) Act No. 15 of 1997 as ruled by the IRC. We say so because that part of the ruling by the IRC was not one of the issues referred to the learned judge




for her determination. However, the view we take of this argument, though valid, is that it does not advance the cause of the appellants.

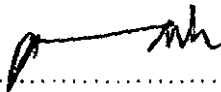
On the whole, we are satisfied that the appeal has no merit and we dismiss it with costs to the respondent to be taxed in default of agreement.



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E. L. Sakala,  
**CHIEF JUSTICE.**



.....  
I.M.C. Mambilima,  
**SUPREME COURT JUDGE.**



.....  
S.S. Silomba,  
**SUPREME COURT JUDGE.**