IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 153/2003**
HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

ARTHUR NELSON NDHLOVU	APPELLANT

AND

AL SHAMS BUILDING MATERIALS COMPANY LIMITED	1ST RESPONDENT
JAYESH SHAH	2ND RESPONDENT

Coram: SAKALA, CJ., CHIBESAKUNDA and CHITENGI, **JJS**.
on 21st June 2005 and 22nd February 2006

For the Appellants: Mr. M Musonda of Messrs Musonda & Company
For the 1st Respondent: Mrs Sharpe Phiri of Messrs Sharpe Howard
For the 2nd Respondent: In Person

JUDGMENT

Chibesakunda, JS, delivered the Judgment in Court

Cases referred to:

1. **Bramblevale Limited [1968] 3 All. E.R.1063**
2. **Enerst Mwaba and Others Vs The People [1987] ZR 19,**
3. **The Attorney General Vs Marcus Kapumba Achiume [1983] ZR 1**
4. **Churchill F. Mutale and Other Vs Credit Africa Bank Limited SCZ Judgment No. 8/141/2001**
5. **Zulu Vs Avondale Housing Project Limited [1982] ZR 172**

Laws referred to:

6. Sections 104 of the Banking and Financial Services Act

This is an appeal against contempt of court judgment by the alleged contemnor, Mr. A N Ndhlovu. These contempt of court proceedings followed a final judgment of the court below and subsequent orders made by the same court in the proceedings initially instituted by the Respondents who were judgment creditors.

Briefly the background to these contempt court proceedings is that the Respondents sued the First Merchant Bank Limited (In Liquidation, herein referred to as the Bank) and the Attorney General, claiming a sum of US $1,013,973.91. This money was held by the bank in a dollar account belonging to the Respondents which was opened in December 1997. On 17th January 1998 the Respondents were informed that the account has been seized on orders from the Drug Enforcement Commission. As a result, the Respondents were not allowed access to the money. Therefore, they sued the Bank and the Attorney General contending that the seizure of the money was illegal. The court below found in the Respondents' favour and ordered the Bank and the Attorney General to return the money to the Respondents together with interest at a Dollar interest. The Bank appealed to this court against this judgment of the High Court and this court upheld the judgment of the High Court, holding that the seizure of the

Respondents' money was unlawful and illegal. This court further stated that the money having been placed in the suspense account was no longer part of the general depositor's account and could not be used either by the Bank or the Respondents.

Pending the hearing of the appeal by this court, the Respondents applied to the High Court to have the judgment debt to be paid into court. This application was granted. The Bank and the Attorney General, however, did not comply with this order to pay into court prompting the Respondents to institute contempt of court proceedings. The alleged contemnor was the liquidating coordinator of the Bank having been appointed by the Bank of Zambia under the **Banking and Financial Services Act**. Initially, the Governor of the Bank of Zambia, which was the liquidator of the Bank, was also cited for contempt of court. But on appeal, the Governor was discharged from the contempt proceedings. His contention that he enjoyed immunity under the **Banking and Financial Services Act** was upheld. This court also held that it could not have been the intention of the legislators to extend immunity to liquidators to disobey court judgments or orders, which go against the liquidators' institutions. So the court below having listened to the evidence before it, in the contempt proceedings, then convicted the Appellant and sentenced him

to a period of 90 days in prison. It is against that order that the Appellant is appealing.

Now before us Mr. Musonda raised seven (7) grounds of appeal:-

1) That the learned Judge in the court below grossly erred when he failed to find that there was no Judgment, order or ruling rendered by the court below or this court which had been directed against the Appellant or which could reasonably be construed as having been directed against the appellant or which was capable of or was intended or calculated to induce the appellant's obedience, be it personal or otherwise;
2) That the learned Judge grossly erred in law when he made the erroneous finding or reached the equally erroneous conclusion that the Appellant was "the Liquidator of First Merchant Bank (in liquidation)" who, by virtue of the said status or position, had been directed (by the court) to return the Respondent's money or to pay the same into court;
3) That the court below fell in error by devoting almost its entire judgment to an evaluation or consideration of evidence and submissions which were unfavourable to the Respondent while totally or substantially ignoring the abundant and favourable evidence and

submissions (including submission in reply) which were adduced or filed on behalf of the Appellant;

4) That the learned Judge in the Court below erred when he reached the conclusion that he was "satisfied beyond all reasonable doubt that the statement in support of the contempt of court proceedings has been proved beyond reasonable doubt and (that he was) satisfied that (the Appellant's) actions were calculated to interfere with the proper administration of justice and intended to deny the Applicants the fruits of final judgment" when the totality of the evidence adduced (both in chief as well as under cross-examination) had demonstrated that the burden of proof had not been satisfactorily or fully discharged and that some reasonable doubt did exit which had entitled the appellant to an acquittal;

5) The learned Judge erred in law when he reached the erroneous conclusion that the Appellant had willfully ignored the judgment of the court and the subsequent order directing payment of moneys into court merely because he did not make an appropriate application either in the court below or this court demonstrate any difficulties he had with the enforcement of the judgment;

6) In any even, the court below erred by convicting the Appellant for contempt of court against the weight of the evidence which had been adduced before him; and

7) That the learned Judge erred by:

a) imposing the excessive and unwarranted custodial sentence of 90 days' imprisonment when a fine or warning or other lesser punishment would have sufficed;

b) directing that the Appellant serves seven (7) of the said days notwithstanding that the sentence had been suspended for six (6) months;

c) directing that the Bank of Zambia should comply with the order (to pay the Respondents) within the said six (6) months; and

d) failing to take into account the mitigating factors surrounding the alleged contempt.

Before this court, counsel for the Appellants relied on his written arguments pointing out that some of the grounds of appeal overlapped. He pointed out that arguments 1, 2, 3, 4, 5 and 6 overlapped. He submitted that the arguments in Ground 6 summarize all arguments of the other grounds of appeal.

In his written arguments he repeated all the arguments he had advanced before the High Court.

He contended in his written submission that the court below lamentably failed to give a balanced evaluation of evidence before it. He went on to submit that the court gave a biased veiw of the evidence. He said that this came out in the way the court reasoned its conclusions. He submitted that the court glossed over the evidence that the alleged contemnor was an employee of Mr. S. Brian Musonda, who was employed as a liquidator by Bank of Zambia. So the orders of the court were not directed towards the alleged contemnor. The orders of 12th October 1999 and the 1st of June, 2000 were directed to Bank of Zambia as provided in **Section 104 of the Banking and Financial Services Act** (6). The Bank of Zambia was the liquidator and the person appointed by Bank of Zambia was Mr. Brian Musonda. The alleged contemnor was not personally obliged to implement these orders of the court.

He quoted from the judgment of the lower court passage indicating that the lower court based its conclusion on wrong passages. He criticized the lower court's conclusion that "he was satisfied beyond all reasonable doubt that the alleged contemnor was guilt of the offence of contempt." According to him, the evidence before the court did not establish the guilt of the alleged contemnor beyond reasonable doubt. He said that the evidence was far from being satisfactory because according to him the alleged contemnor was not the liquidator. He cited Lord Denning in the case of **Bramblevale Limited** (1) where

he defined the standard of proof required in criminal matters. The time-honoured phrase of "beyond reasonable doubt" according to Lord Denning means that the court must be satisfied that there is sufficient proof and that such standard of proof must be that which the court with its responsibility, regards as consistent with the gravity of the charge. He referred to **Enerst Mwaba and Others Vs The People** (2), where Ngulube, DCJ, (as he was then) applied this same standard of proof. He argued that this is a high standard of proof required, which was not satisfied in the case before the court. He argued at length that the Appellant was not ordered by the court to do anything in the orders of the court which are subject of contempt of that proceedings. He referred to these orders and argued that in these orders, the court directed the Bank and the Attorney General "to return" to the Respondents US $1,013,973.91. According to him even the subsequent order of paying into court was not directed to the Appellant.

In support of this argument, he pointed out to the court that the Appellant only became liquidator manager of the Bank on 16th April 2002, when he accepted this appointment by the Bank of Zambia. He therefore was not even a party to the committal proceedings. Even at the time when leave was granted for contempt of proceeding on 10th July 2000 he was not a party to the proceedings.

He was only joined to the proceedings on 11th August 2000.

Mr. Musonda argued that because of the unbalanced evaluation of the evidence by the lower court, this court must interfere with finding in accordance with the case of **The Attorney General Vs Marcus K. Achiume** (3) He referred to the case of **Churchill F. Mutale and Other Vs Credit Africa Bank Limited** (4) and argued that the court had held that, where only the flaws of one side are considered leaving the other flaws on the other side in a case, that is imbalance evaluation and it is a misdirection which would entitle this court to interfere with the findings of fact. Therefore, he urged us to interfere with the findings of fact.

On Ground 7, he argued that in the alternative should this court agree with the findings of the lower court, this court, nonetheless, should look at the sentence the lower court passed against the alleged contemnor. He argued that this court should consider the fact that the alleged contemnor was a first offender and the fact that he was not in a position to control nor direct activities of the Bank or the Bank of Zambia. He was not in a position to direct compliance with the court orders. Therefore, he should not be severely punished. He argued that 90 days custodial punishment is rather excessive and that this court should quash that sentence.

Mrs. Sharpe Phiri in reply submitted that the lower court was on firm ground when it convicted the Appellant.

She submitted that it was common cause that there were two court orders, one dated 12th October 1999 and the other one dated 1st June, 2000. She submitted that the court below considered the evidence in its totality. She referred to the two passages to the evidence of the alleged contemnor where he himself accepted the responsibility of complying with the orders. She quoted these passages:-

> ***"I remember what I stated during the Trial, I remember telling the Court that I would pay the Money if the Order was lifted. That the seizure was lifted by the Court, I am not too sure when it was lifted. It was lifted on 12/10/99 more than a year ago. We have paid a dividend to Al Shams. We have not paid the Judgment debt in total. I have treated Al Shams just like any other creditor. I have not treated the Plaintiff in preference according to the judgment."***
>
> ***"The liquidator is the one responsible for honouring this judgment. Bank of Zambia and myself are responsible. I am the one responsible for honouring the judgment. I am the operative person and I am responsible. I know that disobeying Courts Judgments invites sanctions."***

According to her, this was ample evidence adduced in court to support the conviction of the Appellant. She pointed out to us that the Appellant himself in these two passages accepted personal liability. She argued that from the record, one could see that there was no imbalanced evaluation. The court even considered the evidence of Mr. Mulombwa. So in her view, this court should not interfere with the findings of fact of

the lower court, as there are no good reasons for this interference. She argued that there was no miscarriage of justice.

On Ground 7, she referred to **Wilson Zulu Vs Avondale** (5). She argued that the sentence was not excessive and as such this court should dismiss the appeal.

We have looked at the record. We have also considered the issues raised in this appeal. The view we hold is that Mr. Musonda's arguments, elaborate as they are would have been more persuasive and the authorities cited would have assisted him tremendously had it not been for the statements made by the alleged contemnor before the court during the trial, which Counsel for the Respondents has cited in her arguments.

Mrs. Sharpe-Phiri, in our view, has rightly reproduced the statements the Appellant made in the court below. The Appellant said, ***"The liquidator is the one responsible for honouring this judgment. Bank of Zambia and myself are responsible. I am the one responsible for honouring the judgment. I am the operative person and I am responsible. I know that disobeying Courts Judgments invites sanctions."*** (Own emphasis)

Our considered view is that the Appellant cannot blow hot and cold. It is, therefore, unacceptable for Mr. Musonda to belabour the points he made before this court when there were such statements from his client. It is beyond dispute that the Appellant himself accepted personal liability. It is therefore very unfruitful for Mr. Musonda to submit at length that the burden of proof had not been discharged. Mr. Musonda knows that this court respects Lord Dennings' remarkable contribution to the development of the law on the standard of proof required in criminal cases. But in this case, we are sufficiently satisfied that the court below did not error. There was no misdirection by the court below. We find no merit on the appeal on conviction.

However, coming to the sentence, we agree with Mr. Musonda that 90 days was excessive taking into account the fact that the Appellant was first offender and that although he accepted personal liability, he, because of the circumstances tabulated in evidence on which there was common ground, may not have influenced the compliance or non compliance with the judgment. We therefore allow the appeal on this point only. We quash the sentence. We order that the Appellant be reprimanded. We order costs to be borne by the Appellant, to be taxed in default of agreement.

.....

E L Sakala
CHIEF JUSTICE

.....

L P Chibesakunda
SUPREME COURT JUDGE

.....

R Chitengi
SUPREME COURT JUDGE