IN THE SUPREME COURT OF ZAMBIA **Appeal No. 21/2009**
HOLDEN AT LUSAKA
(Civil Appellate Jurisdiction)

IN THE MATTER OF: THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) RULES CAP 76

AND

IN THE MATTER OF: AN ORDER OF THE HIGH COURT OF JUSTICE FAMILY DIVISION PRINCIPAL REGISTRY, ENGLAND OBTAINED IN THE MATTER OF DEVLAN NICHOLAS SPOONER BORN 29.6.05 AND CAELEN ALEXANDER SPOONER BORN 17.6.07 AND DATED THE 20TH NOVEMBER 2008

B E T W E E N:

ZANETTA NYENDWA **APPELLANT**
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AND

KENNETH PAUL SPOONER **RESPONDENT**

Coram: Silomba, Mwanamwambwa and Chibomba JJS.
On 11th February, 2010 and on 15th June, 2010

For the Appellant: Mr. A. Dudhia of Musa Dudhia and Company
Mrs. N. Sharpe - Phiri of Sharpe and Howard Legal Practitioners
For the Respondent: Mr. M. Yusuf of Messrs Musa Adams & Company

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J U D G M E N T

Chibomba, JS., Delivered the Judgment of the Court.

Cases and other authorities referred to:-

1. Bromley's Family Law, 10th Edition, Page 621
2. Re J (A Child) (Custody Rights: Jurisdiction) (2006) 1 AC 80
3. Zambia National Holdings Limited & United National Independence Party vs Attorney General SCZ Judgment No. 3 of 1994
4. Preethi Khoshie vs Jacob Koshie Appeal No. 138 of 2004.
5. Lumus Agricultural Services Company vs Gwembe Valley Development Company (in Receivership) SCZ No. 1 of 1999.
6. Cheshire and North's Private International Law , 11th Edition, 33 Ibid
7. Halsbury's Laws of England, Volume 8, 4th Edition, Paragraph 758 Ibid 757, 759

Legislation referred to:-

1. The Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76 of the Laws of Zambia
2. The Rules of the Supreme Court, 1999 Edition
3. The Hague Convention On the Civil Aspects of International Child Abduction 1989
4. The Maintenance and Affiliation Orders Act, Chapter 64 of the Laws of Zambia

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5. The Convention on The Rights of The Child
6. The Authentication of Documents Act, Chapter 75 of the Laws of Zambia

This is an appeal from the decision of the High Court contained in the Ruling dated 12th January 2009 in which the learned trial Judge allowed the registration of an ex-parte Order from an English Court ordering the return of two minor children to the United Kingdom.

The facts leading to this appeal are that the appellant and the respondent are mother and father of two minor children then aged 3 and 2 years. The children are the subject of this appeal. The children were born out of wedlock in England. The appellant is a citizen of Zambia and is currently resident in Zambia while the respondent is a British National resident in England. Whilst in England, the respondent and the appellant cohabited together and the two minor children were born. The children, like their father, are British Nationals.

When the relationship between the appellant and the respondent ended, the parties signed a Separation Agreement dated 14th March 2008 which deals, inter alia, with custody of the two children following the separation of the parents. The appellant and the children came to Zambia for a two weeks holiday with a view that the children would be taken back to UK on 4th November 2008. The appellant did not however take the children back to England.

The respondent, by Originating Summons, supported by an Affidavit, applied before the Family Division of the High Court of Justice in England seeking among other reliefs that the said children be returned to England and that they be declared Ward of the English Court. This application culminated into

an exparte Order dated 20th November 2008 (the English Order) which reads thus:

"**Upon hearing Counsel for the Plaintiff and the Defendant being neither present nor represented**

And upon reading the draft Originating Summons and the Affidavit of the Plaintiff dated 14th November 2008

And upon the undertaking of the Plaintiff's Solicitors to issue the Originating Summons within 24 hours

And upon the Court declaring the said Children as Ward of the Court in England.

And upon this Court respectively requesting the relevant legal authorities in the State of Zambia to facilitate the return of the said Wards to the jurisdiction of the Court of England and Wales by 2nd December 2008.

IT IS ORDERED THAT:

1. **That the said minors Devlan Nicholas Spooner born on 26th June 2005 and Caelen Alexander Spooner born on 17th June 2007 do remain Wards of this Honourable Court until further Order.**

2. **The Defendant is hereby ordered by herself her servant or agents to return the said children by 2nd December 2008 to the jurisdiction of the Court of England and Wales.**

3. **Upon the return of the said wards to the jurisdiction of England and Wales the Defendant the mother is hereby restrained until further Order from removing or attempting to remove the said children from the jurisdiction of England and Wales without the permission of the Court…."**

Upon obtaining this Order, the respondent applied Ex-parte, in the High Court for Zambia at Lusaka, under the Foreign Judgments (**Reciprocal Enforcement) Act[1] (the Act)**, for registration of this Order in Zambia. The High Court granted the application for registration on 18th December 2008.

Armed with this Order, the respondent attempted to take the children back to England. However, the appellant with the help of the Immigration and Zambia Police is alleged to have thwarted this. The appellant then applied to set aside

the registration of the English Order The Judge in the Court below however refused to set aside the registration on the grounds stated in the Ruling dated 12th January 2009, the subject of this appeal.

It would be prudent to at this stage recast what the learned High Court Judge stated in refusing to set aside the registration of the English Order. This is that:

"I have noted that this matter was dealt with by the Court of England and the parties signed an agreement for joint custody under the terms and conditions as set out in the Separation Agreement dated 14th March 2008 and the same was signed by both parties. I have further noted that the children named herein are ordinarily resident in England. Furthermore although the applicant is opposing the registration of the exparte order granted in England on the ground that the Zambian Act for the Foreign Judgments (Reciprocal Enforcement) Act does not apply to the case at hand, they have not furnished this Court with an alternative Act which may apply in this case, as the matter stands this is the only Act which has been cited. It is further worth noting that the only forum which can deal with this matter conclusively is the Court in England where the case emanated from."

The appellant, not being satisfied with the decision of the lower Court, filed this appeal appealing against the registration of the English Order.

Four grounds of appeal were advanced and argued. These are that:-

"(i) **The learned Judge in the Court below erred in law when she allowed the registration of the English Ex-parte Order dated 20th November 2008 under the Foreign Judgment Reciprocal Enforcement Act as the said Act is inapplicable in law. Section 2(2) of the Act excludes from expression 'action in personam' any proceedings in connection with guardianship of infants. Part II (entitled 'Registration of Foreign Judgments') states in Section 3(2) (a) and (b) that the part applies to a Judgment if it is final and conclusive between the parties and there is payable thereunder a sum of money.**

(ii) The learned Judge in the Court below erred in law and in fact when she failed to take into account that the respondent had not complied with the requirements of Rule 9 of the Foreign Judgment Reciprocal Enforcement Rules.

(iii) The learned Judge in the Court below erred in law and in fact when she did not consider that the children were now resident in Zambia and as such their custody was subject to the jurisdiction of the Zambian Courts and not

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the English Court and further that the learned Judge should have considered the welfare of the children as her paramount consideration.

(iv) The learned Judge in the Court below erred in fact and in law when she failed to take into account that the so called separation agreement dated 14th March 2008 was not legally binding and even if it was (which is denied) it could not affect the Zambian Courts' jurisdiction to take into account the welfare of the children"

In support of this appeal, the learned Counsel for the appellant, Mr. Dudhia and Ms. Sharpe-Phiri filed Heads of Argument and Additional Heads of Argument upon which they relied. They also made oral submissions. On the other hand, in opposing this appeal, the learned Counsel for the respondent, Mr. Yusuf, relied on the respondent's Heads of Argument and Additional Heads of Argument. He also made oral submissions.

As stated above, the first ground of appeal is that the learned Judge in the court below erred in law when she allowed the registration of the English Order on ground that the **Foreign Judgment (Reciprocal Enforcement) Act**[1] does not apply to guardianship of infants. The appellant relied on Section 2(2) of the Act which they argued, specifically excludes from the expression, '**action in personam'**, any proceedings in connection with guardianship of infants. Section 2(2) provides that:-

"For the purposes of this Act, the expression "action in personam" shall not be deemed to include any matrimonial cause or any proceedings in connection with any of the following matters, administration of the estates of deceased person, bankruptcy, winding up of companies, lunacy or guardianship of infants."

They submitted that the learned Judge in the Court below therefore erred in law when she held that the Ex-parte Order by the English Court could be registered in Zambia under the Act as matrimonial or family matters are expressly excluded by the Act.

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The second argument under the first ground of appeal is that since the English Order was neither a final Order nor was it for payment of a sum of money under

Section 3(2) of the Act, the Court below erred by allowing the Order to be registered. Section 3(2) of the Act states that:-

"**Any Judgment of a superior Court of a foreign Country to which this part extends, other than a Judgment of such Court given on appeal from a Court which is not a superior Court, shall be Judgment to which this part applies, if-**

(a) It is final and conclusive as between the parties thereto; and
(b) There is payable a sum of money, not a sum payable in respect of taxes or other charges alike…"

It was argued that the Act only applies where the Judgment is final and where there is payable a sum of money as stated under Section 3 (2) (a) and (b) of the Act. That on the basis of this interpretation of the Act, the learned Judge in the Court below did not have jurisdiction to entertain the application as the Act did not apply to the English Order she purported to register in Zambia.

It was further argued that the crux of the appellant's contention is that the Judge in the Court below erred in allowing the registration of the English Order as only certain types of orders can be registered. That the English Order is excluded under Section 2(1) of the Act where **"Judgment"** is defined to mean**:**-

"**A Judgment or Order given or made by a Court in any civil proceedings, or a Judgment or Order given or made by a Court in any criminal proceedings for payment of a sum of money in respect of compensation or damages to an injured party."**

It was argued that the first part of the definition provides the scope while the second imposes a qualification of the Judgment to be registered for the purposes of enforcement. That the scope of Judgments that are subject to the Act are those resulting from civil or criminal proceedings while the qualification

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imposed is that they should be Judgments for payment of a sum of money as compensation or damages to an injured party. That the appellant's contention is

that the Act does not extend to divorce, family or probate proceedings since for a Judgment to qualify for registration, there must be an award of money payable to the creditor.

Reference was also made to Order 71/13/ (1), (2) and (7) of the Rules of the Supreme Court[2] (RSC), which deals with reciprocal enforcement of Judgments. It was argued that the above Rule states the type of Judgments that are subject to a certificate for reciprocal enforcement. Order 71/13/2 and 7 provide that:-

"Not every Judgment of the High Court can be made the subject of a certificate. The rule applies to a "Judgment under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty."

"It is thought that applications in the Family Division are likely to be few since they will apply ONLY to Orders for payments of fixed sums, e.g Orders for payment of costs or to a financial provision Order for a lump sum payment ."

It was argued that Section 4 of the Act provides that a Judgment to which part II of the Act applies must satisfy all the requirements of Section 3. Section 4(i) (ii) provides that:-

"A person, being a Judgment creditor under a Judgment to which this part applies, may apply to the High Court and on any such application the Court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the Judgment to be registered."

"Provided that a Judgment shall not be registered if at the date of the application …it could not be enforced by execution in the Country of the original court."

The appellant's contention here is that this Section is couched in mandatory manner and its effect is that a Judgment shall not be registered if it is

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not capable of enforcement by execution in the country of the original court and that the usage of the word "**shall"**, in the Section means that there is no

discretion. That to appreciate the scope of the Act, one does not have to look at the restrictive definition of the term: "**civil**" as opposed to "**criminal**".

With respect to the second ground of appeal which is that the learned Judge in the Court below erred in law and in fact when she failed to take into account that the respondent had not complied with the requirements of Rule 9 of the Foreign Judgment (Reciprocal Enforcement) Rules, this ground was argued in alternative to ground one if the Court found that the Act applies to proceedings relating to children. The appellant's argument under this Rule was that the respondent did not comply with the procedural rules in Rule 9 as to service of the Notice of registration of the Order and on the appellant's right to apply to set aside the registration and the time-frame within which to apply. It was submitted that since the respondent did not comply with this requirement, the registration of the English Order ought to have been set aside.

It was also argued that the English Order was not capable of enforcement under our Act as the registration was contrary to the Act as the appellant did not receive Notice and she did not appear in the English Court and should have been set aside under Section 6(1) of the Act[1] which provides that:-

"6(1) **On an application in that behalf duly made by any party against whom a registered Judgment may be enforced, the registration of the Judgment –**

(a) shall be set aside if the registering Court is satisfied –

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(i) that the Judgment is not a Judgment to which this part applies or was registered in contravention of the foregoing provisions of this Act; or

(ii) …

(iii) That the Judgment debtor, being the Defendant in the proceedings of the original Court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the Country of the original Court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear."

With respect to the third ground of appeal which was that the learned Judge in the Court below erred in law and in fact when she did not consider that the children were now resident in Zambia and as such, their custody was subject to the jurisdiction of the Zambian Courts and not the English Court; the appellant's position was that the learned High Court Judge should have considered the welfare of the children as her paramount consideration. It was argued that since Zambia is neither a signatory nor a party to T**he Hague Convention; The Brussels II Revised; The European Custody Convention**; and **The Anglo-Pakistan Protocol**, the welfare of the child principle applied. That this view is supported by **Bromley's Family Law**[1] which states that:-

"It has long been settled that the English Courts are not bound by foreign custody orders and instead must, applying the principle of the paramountcy of the child's welfare, make their own independent Judgment of the appropriate course of action,"

That in **Re J (A Child) (Custody Rights: Jurisdiction)**[2]**,** the **House of Lords** held that:

"In non-Hague Convention cases, the welfare of the child is the paramount consideration and that the concepts and principles contained in the Hague Convention are not applicable even by analogy. Baroness Hale observed that there was no warrant for principles of the Hague Convention to be extended to Countries which are not parties to the Convention. Baroness Hale further

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observed that there was ample authority for the application of the welfare principle even where a friendly foreign Country had through its Court made orders concerning the child's future. The focus is squarely on the best interest of the individual child in the particular circumstances of the case."

We were accordingly, urged to adopt this principle as a guide. That should we agree with this approach, then the court below erred in law when it stated that the English Court is the only Court that can deal with this matter exclusively as the matter emanated from there when the children were now resident in Zambia and as such their custody was subject to jurisdiction of the Zambian Courts. That she erred by ousting the jurisdiction of the High Court by holding that the only forum which can deal with this matter conclusively was the Court in England where the case originated from.

The case of **Preethi Khosie vs Jacob Koshie**[4] was cited as authority on this. In that case, the High Court, had, in dismissing the appellant's petition for Judicial Separation and Custody observed that since there were other proceedings in the United States of America in the Superior Court in California for legal and physical custody of the minor child of the family and divorce, the proceedings in the High Court were a nullity and an abuse of the Court process. The Supreme Court, on appeal, held inter-alia that the only issue remaining was the custody of the child because the child was domiciled in Zambia and it ordered that the petition be heard by a Judge of the High Court at Lusaka. That accordingly, the Court below fell in grave error when it held that the matter could only be conclusively dealt by the Court in England.

With respect to the fourth ground of appeal which raised issues concerning the validity of the Separation Agreement dated 14th March 2008, the appellant's

argument was that the learned Judge in the Court below erred law in and in fact when she did not take into account that this was not legally binding and could not affect the Courts in Zambia as the Agreement itself specifically stated that it had no legal bearing. That therefore, the learned trial Judge should not have relied on it. It was further argued that since the Separation Agreement was not authenticated in terms of the **Authentication of Documents Act[6],** it has no effect in Zambia and it cannot affect the inherent jurisdiction of the Zambian Court. The case of **Lummus Agricultural Services Company vs Gwembe Valley Development Company (in Receivership)**[5] was cited as the agreement was signed outside Zambia.

It was argued that should this Court find the Separation Agreement to be binding, then it does not affect the Zambian Court's inherent jurisdiction to take into consideration as provided under Section15 of **the Affiliation Act** and the English Common Law, the best interest of the Child. It was argued that since the Court below did not do this, it fell into grave error. We were accordingly urged to allow the appeal and to order that the registration of the English Order be set aside.

On the other hand and as stated above, the learned Counsel for the respondent relied on the Heads of Arguments filed on 25th and 30th June 2009 which he augmented by oral Submissions.

In response to the first ground of appeal, it was argued in the respondent's Heads of Argument that this appeal is neither on custody, guardianship,

maintenance of children nor was it a matrimonial affair but deals with the registration of the English Order by the High Court in Zambia. Our attention was drawn to the Affidavit of 13th January 2009 deposed to by the learned Counsel for the respondent. This Affidavit talks firstly about how the two children were unlawfully prevented by the appellant and others mentioned therein from boarding a flight to London. It states that this was a deliberate and pre-planned conspiracy to abduct the children for the sole purpose of aborting their return to England to enable the appellant buy time to obtain a stay of execution of the Ruling of 18th December 2008.

With due respect to Counsel, on the above arguments, we wish to say from the outset that this deposition amounts to testifying from the bar by Counsel which cannot be allowed. Authorities on this trend abound in our jurisdiction on this. For this reason we shall not delve into the issue as to how the respondent was prevented from taking the children out of jurisdiction by the appellant.

The learned Counsel for the respondent began his submissions by posing three questions which he has invited us to consider and determine. He then proceeded to suggest answers to these questions. These are:-

"(a) Does this Court accept and recognize the aforementioned Order of the High Court of Justice of England and Wales dated 18th November 2008 as a "Foreign Judgment" in terms of Section 2(i) of Act No. 76 of the Laws of Zambia?

(b) And as such is the Order valid for registration as the Judgment of foreign superior Court within the provisions of Foreign Judgments (Reciprocal Enforcement) Act No. 76 of the Laws of Zambia?

(c) And if so, is the registration valid in compliance and in terms of Section 4 of the Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76 of the Laws of Zambia?

In urging us to find for the respondent, reference was made to Part 1 of the Act where "**Judgment"** is defined to mean: "**a Judgment or Order given or made by the Court in any civil proceedings or criminal proceedings"**.

It was argued that **"in any civil proceedings"**, means an action in civil proceedings which is distinct from "**criminal proceedings".** That this is inclusive of any judgment or order of a foreign superior Court and that the definition of "**Judgment**" is therefore in two parts:- a judgment in any civil proceedings of the one part" or "a judgment in "any criminal proceedings for payment of a sum of money in respect of damages or compensation to the injured party" on the other part.

Counsel also suggested definitions of other terms used in defining "Judgment", such as "**or**", "**and**" and "**any".** Counsel accordingly urged us to consider and apply 'the well established and only safe canon of construction' - by giving the words used in defining "Judgment", their natural meaning. And to be very slow to assume that the legislature had made a mistake unless driven to it and that in the current case, the definition of the word: "**Judgment"**, is clearly unequivocal as to the object or scope of the Act and that the suggested interpretation of "**Judgment",** by the appellant's Counsel is inaccurate as it does not unequivocally show that "**Judgment**", as defined in the Zambian Act, is limited or exclusive to where there is a sum of money payable as the intention of the Act is to facilitate registration and enforcement of all foreign Judgments in any civil proceedings. That it is clear that only in criminal proceedings does the

issue of payment of a sum of money arise. It was argued that Section 4 of the Act states that a **Judgment can be registered if at the date of application for registration, it had not been wholly satisfied and it could not be enforced by execution in the country of origin.**

That in the current case, the English Order has not been wholly satisfied nor discharged and that it is not enforceable in England and therefore it was valid for registration in Zambian Courts. That the appellant has no valid argument on the issue of the English Court Order for the purpose of registration in Zambia in terms of Section 2 (1) and (2) of the Act[1]. That the Court should take note that the words defined in the **Preamble** to the Act give guidance for the terms and provisions enacted in the Act which in the present case do not mention in its main body whether the Act effectively exclude foreign Orders in any civil proceedings from registration in the Zambian Courts not withstanding the definition of "**action in personam**".

In response to the second ground of appeal which was that the appellant was not served, it was argued in the respondent's Heads of Argument that paragraphs 18 and 19 of the Affidavit in Opposition at page 29 of the Supplementary Record of Appeal show that the appellant was duly served with the Court orders and that the only issue is the registration of the English Order as all the other matters should be brought before the English Court. That the English Court ordered the appellant to return the children to the jurisdiction of

the English Court as Ward of the Court pending further direction as to the welfare of the children but that the appellant has deliberately neglected to do so.

It was argued that the appellant has shown no standing in this Court for the sole custody of the children in light of the Separation Agreement as the children are UK citizens and are Ward of the English Court and therefore matters of their custody and maintenance should be argued in the English Court since the children are ordinarily resident in England and their father is also a UK citizen.

It was submitted that the learned trial Judge did not err by not considering the requirements of Rule 9 of the Act pertaining to Notice of registration as no such Notice was required since a notice is only required when the Judgment or Order is of preliminary nature.

In response to the third ground of appeal, it was argued in the respondent's Heads of Argument that the opinion of **Rebecca Bailey Harris** is irrelevant on ground that she is not an expert on Zambian Law and it was not known if she was a practicing lawyer in England as her qualifications are not known. That the trial Judge was therefore on firm ground by not considering the welfare and the inherent jurisdiction of the Zambian Courts as the High Court in that matter was purely considering the issue of registration of a foreign Judgment and not custody. That the appellant's Advocates have therefore misunderstood the nature of the respondent's application by applying the Bastardy Laws

Amendment Act 1872 of UK and the Law relating to Maintenance and Custody of the children.

In response to the fourth ground of appeal, it was argued on the respondent's behalf that the Separation Agreement is valid and binding on the parties and is enforceable against the parties to it as it covers all the aspects of the rights of the parties. That the respondent's prayer therefore, is that this appeal should be dismissed with costs to the respondent; that the appellant be ordered to surrender the children and their passports to the respondent for their return to England as wards of the English Court and that the Immigration Officers and the Zambian Police be ordered to permit safe and unhindered travel to England to the respondent and the children.

We have seriously considered this appeal together with the arguments in the appellant's and the respondent's Heads of Argument, the oral submissions by the learned Counsel for the parties and the authorities cited. We have also considered the Ruling appealed against. We wish to state from the outset that we agree that this appeal raises questions of law as to whether the English Order dated 20th November 2008 obtained ex-parte by the respondent from the High Court of Justice, Family Division in England, was capable of registration under the law and rules in **the Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76 of the Laws of Zambia[1].** We are also cautious that this appeal is not about custody or maintenance of the minor children in question. To that extent, we agree that arguments pertaining to these issues are out of context.

We shall therefore endeavour not to delve into them except in so far as they touch on the main issues to be determined in this appeal. We agree with the learned Counsel for the respondent that the main cause of this appeal is the registration of the English Order.

With respect to the first ground of appeal, the question is whether the English Order was capable of registration under our Foreign Judgment (Reciprocal Enforcement) Act. We believe this is the crux of the matter which we have to determine in this appeal.

The first argument was that the Act does not apply to guardianship of infants as this is excluded by Section 2. The second argument is that since the English Order was not a final Order, it was not capable of registration under Section 3(2) (a) of the Act. Thirdly, that since the English Order was not for payment of money, it was not capable of registration under Section 3(2) (b) of the Act. The fourth argument was that Section 2(1) and (2) of the Act excludes Judgments or Orders of the type of the English Order from registration on ground that it was not a Judgment for payment of money as it related to guardianship of minor children as confirmed by Order 71/13/2 and (3) of the RSC. The fifth argument was that the proviso in Section 4 of the Act[1] prohibits registration of a Judgment if it is not capable of enforcement in the country of the original court. That the English Order was not capable of enforcement by execution as it was not for payment of money since it deals with guardianship of infants.

On the other hand, the respondent's argument was that the registration of the English Order was proper as payment of money only applies to criminal judgments and not to civil Judgments.

We have examined the provisions of the Zambian Act[1]. The position in England, in accordance with **Cheshire and North[6],** is that a Judgment obtained from another Commonwealth Country may be registered for the purpose of enforcement if the registering Court thinks it just and convenient. The learned authors also state that registration is not a right but in the discretion of the registering Court and that a Judgment cannot be registered unless it is one under which a sum of money is payable. The learned authors also state that registration is not allowed if the original Court acted without jurisdiction or if the judgment debtor did not submit to the jurisdiction of the original Court or if the judgment debtor was not served or did not appear in the original proceedings.

We agree with **Cheshire and North[6]** that the above applies to Zambia which is also a member of the Commonwealth and also applies the common law principles.

The learned Authors also explain in similar terms the meaning of **Action in Personam**. They state that:-

"Action in personam" shall not include any matrimonial cause, or any proceedings connected with matrimonial matters, the administration of the estates of deceased persons, bankruptcy, winding up of Companies, lunacy or the guardianship of minors."

Halsbury's Laws of England[7] states that:-

"**The Foreign Judgments (Reciprocal Enforcement) Act 1933 applies to Judgments or orders made by the superior Courts in civil proceedings, or in criminal**

proceedings concerning the award of compensation or damages to an injured party. The Judgment must be for a sum of money, not being a tax, fine or penalty. It must be final and conclusive as between the parties;"

It also states that:-

"**The principle of registration of foreign judgments on a reciprocal basis is also applied in the Foreign Judgments (Reciprocal Enforcement) Act 1933, under which, where a foreign Country will give substantial reciprocity of treatment as respects the enforcement of judgments given in the superior Courts of the United Kingdom, an Order in Council may direct that Part 1 of the Act is to extend to that Country and to such superior Courts of that Country as may be specified in the Order. Any such Order in Council may be varied or revoked**."

And that:-

"Application for registration is made by the judgment creditor to the High Court. The Judgment must not have been wholly satisfied, and must be capable of being enforced by execution in the Country in which it was pronounced. On proof of these and other prescribed matters, the Court must order the Judgment to be registered."

The English Order that the lower Court, registered, as stated above, orders the appellant to return the minor children to the jurisdiction of the English Court. It is not for payment of money. Neither is it final or conclusive between the parties and its life span is very limited. It is an ex-parte order obtained in the absence of the appellant. The Order itself states so.

In view of the above authorities and indeed, the provisions of our own Act[1], there can be no doubt that the English Order was not capable of registration under the Laws of Zambia as illustrated below.

Section 2 of the Act specifically excludes the guardianship of infants from the Act. The argument that Chapter 76 is limited in scope as certain Judgments or Orders are specifically excluded from the Act is correct and we uphold it since the Act excludes from its application, guardianship of infants, bankruptcy proceedings, matrimonial causes, deceased's estate, lunacy etc - vide Section 2.

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Section 3(2) (a) of the Act also excludes Judgments that are not final and conclusive from being registered as is the case with the exparte Order, the subject of this Judgment.

Further, the English Order is not for payment of a sum of money as it deals with the return of the minor children, mentioned therein, to the jurisdiction of the English Court as Ward of the English Court by the appellant. Therefore, its registration was contrary to Section 3 (2) (b) of the Act as it excludes Judgments that are not for payment of money from being registered. See also Order 71/13/2 and (3) of the RSC[2]. Further, Section 3 of the Act prohibits registration of a foreign Judgment if it was incapable of enforcement while Section 4(1) excludes guardianship of infants from the Act.

Although it has been argued on the respondent's behalf that the English Order was capable of registration as it is only in criminal matters where the qualification that the Judgment or Order sought to be registered must be for payment of a sum of money as compensation or damages to an injured party, we do not accept this contention on the ground that this is not the correct interpretation of Section 2(1) of the Act. Proper reading of Section 2(1) of the Act which defines "**Judgment**" will show that a "**Judgment**" or **Order** relating to guardianship of infants is specifically excluded from the Act as it is not for payment of money. We have quoted above the provision of **paragraph 758 of Halsbury's Laws of England[7]** and from **Cheshire and North[6].** These state authoritatively that a Judgment cannot be registered unless it is for payment of

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money to the judgment creditor. We therefore agree that the English Order was not capable of registration under the Zambian Act[1]. Its registration was therefore contrary to the provisions of the Act[1] as illustrated above.

In conclusion, we wish to say by way of emphasis that we have no doubt that on the above grounds alone, the English Order was not capable of registration under the Zambian Act[1]. Its registration ought to have been set aside had the learned Judge in the Court below properly addressed herself to and interpreted the provisions of the Act as illustrated above.

We thus agree that the Act must be read as a whole and not in isolation in order to understand its meaning and scope and/or extent of its application. Further, since the appellant did not appear before the English Court, the registration ought to have been set aside. As much as we agree that the children may be citizens of UK and their father, the respondent, is a UK Citizen; we are nevertheless of the firm view that the respondent ought to have applied in Zambia instead of England for the return of the children to England. By applying in UK, he made a grave error as there is no Reciprocal arrangement for registration and enforcement of this type of judgment or Order between Zambia and the UK. Further, Zambia is a non-Convention Country and is not party to the Hague and other Conventions relating to the subject matter of the English Order.

The first ground of appeal therefore succeeds.

With respect to the second, the third and fourth grounds of appeal, since these were argued in the alternative to ground one ie, if ground one failed and

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the first ground having succeeded, the rest of the other grounds advanced and argued have become otiose and we do not need to rule on them.

The sum total is that this appeal succeeds. We accordingly set aside the findings of the Court below as the English Order is not one to which the Zambian Act[1] applies. The registration of the English Order is accordingly set aside. Costs will follow the event and are to be taxed in default of agreement.

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S. S. Silomba
SUPREME COURT JUDGE

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M. S. MWANAMWAMBWA
SUPREME COURT JUDGE

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H. CHIBOMBA
SUPREME COURT JUDGE