

SCZ Ruling No. 21 of 2013
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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

SCZ/8/122/2012

IN THE MATTER OF: ORDER 113 OF THE RULES OF THE SUPREME COURT (WHITEBOOK) 1999 EDITION

AND

IN THE MATTER OF: AN APPLICATION FOR SUMMARY POSSESSION OF FLAT NO. 5 STAND NO. 29390 CHILA ROAD, LUSAKA

BETWEEN:

ARISTOGERASIMOS VANGELATOS

1ST APPELLANT

VASILIKO VANGELATOS

2ND APPELLANT

AND

METRO INVESTMENTS LIMITED

1ST RESPONDENT

KING QUALITY MEAT PRODUCTS LIMITED

2ND RESPONDENT

DEMETRE VANGELATOS
RESPONDENT

3RD

MARIA LIKIARDO POILOU(COVERT BARON)
RESPONDENT

4TH

CORAM: Mwanamwambwa, Wanki and Muyovwe, J.J.S.

On 20th February 2013, and 13th December 2013

For the Appellant: Dr J Mulwila, S.C., of Messrs Ituna Partners and with him Mr A. Kansolo.

For the Respondent: Mr L Linyama of Messrs Silwamba and Company.

Ruling

Mwanamwambwa, JS, Delivered the Judgment of the Court.

Cases referred to:

- 1. Ozonkwo v. Attorney General (1985) Z.R. 163**

Legislation referred to:

- 1. The Supreme Court Act, Cap 25 of the Laws of Zambia. Section 24(i)(e).**
- 2. The Supreme Court Rules, 1999. Order 28, Rule 9.**
- 3. The High Court Rules. Order 30, Rule 11 and Order 6, Rule 1.**

For convenience, we shall refer to the Appellants as the Defendants and Respondents as the Plaintiffs, which is what they were in the Court below.

By this motion, the Defendants are seeking an Order to vary or reverse the decision of the single Judge, dated 16th May, 2012. By that decision the single Judge of this Court discharged an Order of Stay of Execution, of the High Court Judgment which he had earlier granted. He also awarded costs to the Plaintiff. The learned single Judge made the decisions in question on the ground that there was no leave granted to the Defendants by the High Court, to appeal against it's Judgment of 5th April, 2012.

The brief facts of this matter are that, in 2007, the Plaintiffs applied, by originating Summons, in the High Court, for the following:-

- (i) A declaration that the defendants are not shareholders or Director in the 1st and 2nd plaintiff companies and therefore,**

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lack the requisite locus standi to take assets that belong to the said companies;

- (ii) An Order for possession of Stand No. 29390 Lusaka;**
- (iii) An account of how the defendant has used all the moneys collected from the leasing out of flats at Stand 23930 Lusaka;**
- (iv) An Order, for removal of caveats lodged by the 1st defendant on all properties that belong to the 1st and 2nd plaintiffs;**
- (v) An Order for removal of caveats lodged by the 1st defendant on all properties that belong to the 1st and 2nd plaintiffs;**
- (vi) Damages occasioned to the 1st plaintiff as a result of the acts of the defendants in interfering with construction works at Stand No. 29390 Lusaka;**
- (vii) Damages for loss of used funds;**
- (viii) Interest on all sums payable at the short term deposit rate; and**
- (ix) Costs.**

On 21st May 2008, the Plaintiffs applied for leave to amend the originating process so that the matter should be deemed to have been commenced by Writ of Summons and statement of claim. In the same application, the Plaintiffs added more claims. As a result, the matter became contentious and it became

necessary to call for viva voce evidence. To that effect paragraph 4 of the affidavit supporting the application reads as follows:

“4. That in view of the proposed amendments and contentious issues which arise herein, it is necessary to call viva voce evidence and to allow for cross-examination of parties. The document now

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shown to me marked “DV2”, is true copy of the proposed statement of claim.” Leave was granted and the amendments were effected.

The Judgment in the Court below shows that the Defendants put up a counter-claim. But the nature of the counter-claim was not specified.

At trial, viva voce evidence was given. However, trial took place in chambers and not in open Court. Judgment was also delivered in chambers.

On 5th April, 2012, the lower Court passed Judgment in favour of the Plaintiffs. It granted the reliefs as follows:-

“The following Orders are:-

- (i) The defendants are not shareholders or directors in the first and second plaintiff companies and therefore have nothing to do with the three companies assets;**

- (ii) Immediate possession of Metro Investment Limited Properties for which properties they hold conclusive title and the title is inviolate save and except as provided by Section 33 of the Lands Deeds Registry Act;**
- (iii) Immediate accounting to Metro Investments all the rents first and second defendants received;**
- (iv) Immediate removal of caveats on properties belonging to first, second, third and fourth plaintiffs;**

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- (v) The Deputy Registrar to assess damages to the plaintiffs for the unlawful interference with the properties;**
- (vi) The Police Commissioner, Lusaka Province is ordered to give escort to the bailiffs to take possession as the first defendant appears to be a violent disposition.**
- (vii) The dollar rent collectable will attract 8 percent from the filing date of the action until judgment thereafter 2 per cent; and**
- (viii) The damages in Kwacha will attract the long-term deposit rate from the filing date of the action until judgment, thereafter six (6) percent until payment that is damages claimed under head VII damages for non-use of fund under head VIII fall away as interest has been awarded on rent collectable.”**

On 17th April 2012, the Defendants lodged a Notice of Appeal against the Judgment. Thereafter, they applied to the learned

trial Judge for an Order to Stay Execution of the Judgment, pending determination of appeal. On 20th April 2012, he ruled on the application, and dismissed it. But he granted leave to appeal against the Judgment and the Ruling refusing stay of execution. On 23rd April 2012, the Defendant obtained an Ex-parte Order of stay of execution of the Judgment, from a single Judge of this Court. Later, the single Judge heard the application inter-parte. And in a ruling delivered on 16th May 2012, he discharged the Ex-parte Order of stay and refused the Defendant's application to stay execution. He based his refusal on the following conclusion:

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“On the evidence from affidavits and their exhibits, I am satisfied that this matter was held and decided in chambers and therefore, leave to appeal to the Supreme Court is required. It was not obtained and no leave was applied for in the High Court..... The case of NFC Africa Mining Plc v Techro Zambia Ltd (2009) Z.R. 236, referred to by Counsel for the Respondent represents the position of the Law. The Notice of appeal filed and accepted by the Supreme Court staff, when leave is required and not obtained, is of no effect. These papers are irregularity before the Court, I cannot, therefore, stay execution of judgment pending nothing. On this ground alone, this application must be dismissed.”

On 23rd April, 2012 the Plaintiffs issued a Writ of possession against the Defendant. And the same day, execution was done. On 24th September 2012, the Defendants lodged this motion.

We are asked to vary or reverse the ruling of the single Judge in chambers on two grounds.

The 1st ground is that the learned single Judge misdirected himself in thinking that there was need to obtain leave of the Court below, before filing the Notice of Appeal in the Supreme Court and that consequently the Defendants' application before him was incompetent.

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On behalf of the Defendants, on ground one, Dr Mulwila submits that upon amendment of the Court process, the matter became an open Court matter, notwithstanding that deliberations were held in chambers. In support of his submission he cites **Ozokwo v The Attorney General**⁽¹⁾.

He further submits that although leave of the Court below was not required before filing a Notice of Appeal to the Supreme Court, the Court below, in fact granted leave to the appellants, as per pages 29 and 30 of the Notice of Motion. Therefore, the learned single Judge misdirected himself by placing reliance **Section 24(i) (e) of the Supreme Court Act**, when he

concluded that the Defendants needed to have applied for leave. He points that, **Section 24(i) (e)** is applicable to Orders or interlocutory Judgments made in chambers, not where sitting in Chambers is deemed to be sitting in open Court.

We must say, at once here, that we agree with Dr. Mulwila. At the instance of the Plaintiffs, the Court below ordered that this matter, began by Originating Summons, shall precede as if it had been began by Writ of Summons and Statement of claim. That Order was made pursuant to **Order 28, Rule 9 of the Supreme Court Rules, (1999)**. Indeed, the Plaintiffs drew a statement of claim to that effect. Once that Order was made, the matter was removed from **Order 30 Rule 11 of the High Court Rules**, which

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deals with business to be disposed of in Chambers. Thereafter, the position was as if it had began by Writ of Summons, under **Order 6 Rule 1 of the High Court Rules**. It had become an open Court matter; and no longer a matter to be disposed of in chambers. And trial should have been conducted in open Court and not in chambers. Judgment too, should have been delivered in open Court.

We do not accept the submission by Mr Linyama that this was a chamber matter; just because the proceedings were conducted in chambers and the Judgment delivered in chambers.

We do so for the reasons stated above. We would add that the other claims that were added by the Plaintiffs rendered the matter contentious. These include a declaration and damages. You cannot try contentious matters, such as declaration and damages, pleaded in a statement of claim, in chambers. Only contentious matters are determined in chambers, on affidavit evidence. It is the Rules of procedure, and not the venue of deliberations, that determines whether a matter is an open Court one or a chamber one. Rules of procedure state that a contentious matter, pleaded in a statement of claim and supported by viva voce evidence, such as this, is an open Court matter. And it should have been dealt with as such.

Contrary to the argument of Mr Linyama, we are of the view that **Ozokwo v The Attorney General**⁽¹⁾, is applicable to this

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matter. It is not distinguishable. In that case, the trial Judge heard, in chambers, a matter that ought to have been heard in open Court. This Court held that, although the trial Judge deemed it convenient to hear the matter in chambers, the issue of quantum of damages was an open Court matter, leave to appeal was not necessary.

In the present case, the learned trial Judge heard the matter and delivered Judgment in chambers. That was a mistake. The correct procedure is that trial of a contentious matter, involving declaration and damages, in a Statement of Claim, involving viva

voce evidence, and in the general list of the High Court, should be held in open Court; and not in chambers. We are of further review that where chamber matters, such as removal of caveats and possession of land under **Rules of the Supreme Court, Order 13**, are claimed together with contentious open Court matters, such chamber matters will also be simultaneously dealt with contentious claims, in open Court. This disposes of the submission by Mr Linyama, as to what was, or was not, the main claims in this matter.

We hold that there was no need for leave of the High Court to appeal, since on procedure, this was an open Court matter. Accordingly, we allow ground one. We hereby reverse the decision of the single Judge to the extent he held that there was need for the

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Defendants to obtain leave to appeal and that none was granted. We also reverse the order as to costs.

We now move on to the Stay of Execution of the High Court Judgment. The decision by the learned single Judge on leave, led to discharge of the Order of Stay of execution and indeed his refusal to stay execution of the High Court Judgment, pending appeal. The question is whether we can Stay Execution of the Judgment now. The answer is in the negative. Execution of the Judgment was done on 23rd April 2012. That was about five (5)

months before this motion was filed. The Plaintiffs took possession of the stand in dispute on that date. As of now there is nothing to stay. So, we refuse to grant the stay. However, we order that the property in dispute must not be sold until the appeal is disposed of.

The 2nd ground is that the learned single Judge erred in fact and law when he said that the issue of jurisdiction of the trial Judge was not raised in the Court below.

In view of our decision in ground one, we do not find it necessary to consider this ground. Secondly, we note from page 245 of the Motion that jurisdiction of the learned trial Judge is the subject of ground one of the main appeal. We are of the view that dealing with this ground now, will end up delving into ground one of the main appeal. That would pre-empt ground one of the appeal.

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The motion having succeeded, we award costs to the Defendants to be taxed in default of agreement.

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M.S. MWANAMWAMBWA
SUPREME COURT JUDGE

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M.E. WANKI
SUPREME COURT JUDGE

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E. C. MUYOVWE
SUPREME COURT JUDGE