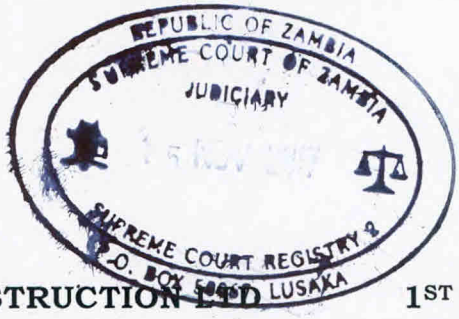
IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 141/2016**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

MURRAY & ROBERTS CONSTRUCTION LTD **1ST APPELLANT**

KADDOURA CONSTRUCTION LIMITED **2ND APPELLANT**

AND

LUSAKA PREMIER HEALTH LIMITED **1ST RESPONDENT**

INDUSTRIAL DEVELOPMENT CORPORATION

OF SOUTH AFRICA LIMITED **2ND RESPONDENT**

CORAM: Malila, Kajimanga and Mutuna, JJS

On 1st November, 2016 and 15th November 2017

FOR THE APPELLANTS: Mr C. Sianondo, Messrs Malambo & Co.

FOR THE RESPONDENTS: No Appearance

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Mileta Pakou and Others v Rudnap Zambia Limited (1998) Z. R. 233**
2. **Attorney General v Chiluba and Others (2010) Z. R. Vol. 1 287 (H. C.)**
3. **John Mugala and Kenneth Kabenga v Attorney General (1988 – 1989) Z. R. 171**

Legislation referred to:

Foreign Judgments (Reciprocal Enforcement) Act Chapter 76, Section 3

This is an appeal against a ruling of the High Court judge delivered on the 6th July 2016, declining the appellants' ex parte application for leave to issue a writ of possession to facilitate the sale of Stand No. 1292 Chelstone, Lusaka. By the same ruling, the lower court did not only set aside the Deputy Registrar's default judgment of 4th May 2016 for irregularity but also wholly dismissed the appellant's action for abuse of court process.

The background to this appeal is that the appellants instituted legal proceedings against the 1st respondent in the High Court of South Africa and subsequently obtained a judgment in the sum of US$6,507,266.72 in their favour on 8th September, 2011. The 1st respondent not having assets in South Africa to satisfy the judgment sum and there being assets in Zambia, the appellants issued a writ out of the commercial list of the High Court of Zambia on 26th November, 2015 endorsed with a claim for:

> **"1. Payment of all sums due and payable to the plaintiffs by the [1st] defendant under the JBCC Building Agreement;**

2. **Payment by the [1st] defendant of the sum of US$6,507,266.72, inclusive of interest due under the respective certificates and owing to the Plaintiffs as at 31st May 2011, as evidenced and ascertained by the judgment of the High Court of the Republic of South Africa handed down on 8th September 2011;**

3. **A declaration that the plaintiffs' lien crystalized upon the default by the defendant in payment of the certified amounts and that the plaintiffs are entitled to exercise all rights available to them in respect of Stand No. 1292, Chelstone Lusaka as lien holders;**

4. **An Order of possession and sale of Stand No. 1292, Chelstone Lusaka by the Plaintiffs;**

5. **An order that the proceeds from the sale be applied in the first place towards liquidation of sums due, if any, to the 2nd Defendant as Mortgagee with a prior registered interest and that the balance thereafter be applied towards liquidation of the debt due to the Plaintiffs;**

6. **An order that the judgment of the High Court of the Republic of South Africa handed down on 8th September 2011 is enforceable in the Republic of Zambia;**

7. **Interest at the contractual rate from 1st June, 2011 until the date of judgment and thereafter at the Bank of Zambia lending rate from time to time until full settlement of the judgment sum;**

8. **Any other relief the court may deem just; and**

9. **Costs"**

On 4th May, 2016 the appellants obtained a judgment in default

of appearance and defence. On 23rd June, 2016 the appellants filed an ex parte summons for leave to issue a writ of possession to facilitate the sale of Stand No. 1292 Chelstone, Lusaka. The affidavit in support of the summons deposed to by Hazem Mohamad Bahij Kaddoura, the 2nd appellant company's chief executive officer disclosed that on 4th May, 2016 the High Court granted the appellants judgment in default of appearance and defence. Among the reliefs sought was an order for possession and sale of Stand No. 1292 Chelstone, Lusaka. To facilitate the sale, it had become necessary to seek possession of the said property. The application was not opposed by the respondents.

In his ruling, the High Court judge stated that the application raised two questions which had to be answered in the affirmative before leave to issue a writ of possession sought by the appellants could be granted. He listed them as follows:

> **"1. Whether in the circumstances of this case, the judgment in default of appearance and defence of 4th May 2016 is a judgment that may be enforced.**
>
> **2. Whether the ex parte application for leave to issue a writ of possession is in compliance with Order 45, rule 5 of the Supreme Court Practice Rules (The White Book)."**

The judge answered the first question in the following manner:

"... a cursory perusal of the short proceedings herein reveals that the writ of summons accompanied by a statement of claim issued by the plaintiffs on 26th November, 2015 was and is intended to have registered and enforced in Zambia the judgment of the High Court of the Republic of South Africa of 8th September, 2011. All of the Plaintiffs' claims endorsed on the writ of summons lead to this one fact and the reasons for this registration and enforcement in Zambia can reasonably be discerned from paragraphs 20 and 21 of the statement of claim referred to above which state:

> **"20. As a result of the 1st defendant's failure to liquidate the judgment sum, the said judgment remains wholly due and unsatisfied and there are no assets of the 1st defendant in the Republic of South Africa to satisfy the judgment.**
>
> **21. The plaintiff avers that the 1st defendant has resources within this jurisdiction which can be used to satisfy the judgment debt."**

The judge went on to find as follows:

"I therefore, have no difficulty in finding the process used by the plaintiffs in commencing a fresh action by way of writ of summons accompanied by a statement of claim to register in Zambia a foreign judgment as devoid of any legal basis. The plaintiffs ignored the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76 of the Laws of Zambia at their own peril.

This answers in the negative the first question which is, whether in the circumstances of this case, the judgment in default of

appearance with defence of 4th May, 2016 is a judgment that may be enforced? It cannot. It is a product of a flawed and incurable procedural process.

Having answered the first question in the negative, there is no need to determine the second question.

Consequently, I refuse to grant the plaintiffs leave to issue [a] writ of possession."

He finally held that:

"Further, in view of all the foregoing, I am compelled to invoke the inherent jurisdiction which this court always has to control proceedings before it to, inter alia, ensure that court process is not abused and accordingly make the following orders:

a) The judgment in default of appearance with defence entered by the Deputy Registrar on 4th May, 2016 is set aside for irregularity.

b) The plaintiffs' action commenced by writ of summons accompanied by a statement of claim on 26th November, 2015 is wholly dismissed for abuse of court process."

Dissatisfied with this decision, the appellants have appealed on three grounds as follows:

"Ground 1

The court below erred both in law and fact in setting aside the default judgment and the originating process in the absence of any application to that effect and without affording the parties an opportunity to be heard.

Ground 2

The court below erred both in law and fact by rendered [rendering] a decision without disclosing how incorrect the procedure employed was.

Ground 3

The learned trial judge erred when he ruled that the action was incorrectly commenced."

At the hearing, the learned counsel for the appellant, Mr. Sianondo, stated that he was relying entirely on the appellants' written heads of argument filed on 26th July 2016. The respondents neither attended the hearing nor filed heads of argument, notwithstanding evidence of substituted service having been effected by the appellants' advocates.

Starting with the third ground of appeal, Mr. Sianondo in the appellants' heads of argument, relied on the case of **Mileta Pakou and Others v Rudnap Zambia Limited**[1] in arguing that at common law, a foreign judgment is enforceable as a simple debt. He also referred us to the following passage in the judgment of the same case:

"Yugoslavia was not one of the scheduled countries under the Foreign Judgment (Reciprocal Enforcement) Act Chapter 76 of the Laws of Zambia and therefore, the question of enforcing the judgment of its

court directly by registration did not arise."

The learned counsel submitted that the above position of the law was emphasized in the case of **Attorney General v Chiluba and Others**[2], a High Court decision where Hamaundu, J (as he then was) stated that:

"A judgment creditor wishing to enforce a foreign judgment at common law will have to commence an action founded on the judgment as a cause of action."

Mr. Sianondo submitted that it was beyond doubt that the Republic of South Africa is not one of the scheduled countries under the Foreign Judgment (Reciprocal Enforcement) Act and as such the procedure available to the appellants is to commence another action based on the South African judgment. He accordingly submitted, in this regard, that the lower court gravely misdirected itself and prayed that this ground be allowed.

Regarding the second ground of appeal, Mr. Sianondo submitted that the court below only stated that **"the plaintiffs ignored the provisions of the Foreign Judgment (Reciprocal Enforcement) Act, Chapter 76 of the Laws of Zambia at their own**

peril" without giving reasons as to how the same has been infringed, if at all, so as to allow the appellants to assess their course of action. We were referred to the case of **The Minister of Home Affairs and Attorney General v Lee Habasonda (suing on his own behalf and on behalf of the Southern African Centre for Constructive Resolution of Disputes**[3], where this court reasoned that:

> **"We must, however, stress for the benefit of trial courts that every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities, if any, to the facts. Finally, a judgment must show the conclusion. A judgment which only contains verbatim reproduction and recitals is no judgment. In addition, a court should not feel compelled or obliged and moved by any decided cases without giving reasons for accepting those authorities. In other words, a court must reveal its mind to the evidence before it and not just simply accept any decided case."**

The learned counsel contended that by withholding the reasons, the lower court denied the appellants an opportunity to profer appropriate grounds of appeal against its ruling. We were accordingly urged to allow this ground of appeal.

As regards the first ground of appeal, Mr. Sianondo submitted that as demonstrated in ground three, the course taken by the appellants in commencing this action is the appropriate procedure and as such the orders of the trial court were erroneous. According to the learned counsel, the court below volunteered a ruling. He relied on the case of **John Mugala and Kenneth Kabenga v Attorney General**[4], where this court stated that:

> **"It is most undesirable for a trial judge to volunteer a ruling especially without affording the parties advance notice of what the judge has in mind and giving them the opportunity to address him. The better practice is to make a ruling only when the defence make a submission and even then, the judge should be slow to take a decision on the evidence before he has heard it all."**

We were also urged to sustain this ground of appeal.

We have considered the record of appeal, the ruling appealed against and the appellant's heads of argument. In determining the grounds of appeal advanced by the appellant, we will also follow the same sequence they have been argued by the learned counsel for the appellants.

The appellant's grievance in ground three is that the trial judge was wrong when he ruled that the action was wrongly commenced. The learned counsel argued that since South Africa is not one of the scheduled countries under the Foreign Judgments (Reciprocal Enforcement) Act, the South African judgment could only be enforced by commencing an action to recover the judgment sum. Indeed, we are also in agreement that the trial judge fell into serious error.

The point should be made that in Zambia two avenues are available for enforcing a judgment awarded by a foreign court. The first avenue is to seek to register the foreign judgment pursuant to the Foreign Judgments (Reciprocal Enforcement) Act. Section 3 of the Act states as follows:

> **"3. (1) The President, if he is satisfied that, in the event of the benefits conferred by this Part being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the High Court, may by statutory order direct –**
>
> **(a) that this Part shall extend to that foreign country; and**
>
> **(b) that such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for the purpose of this Part.**

(2) Any judgment of a superior court of a foreign country to which this Part extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part applies, if –

(a) it is final conclusive as between the parties thereto; and

(b) there is payable thereunder a sum of money, 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; and

(c) it is given after the commencement of the order directing that this part shall extend to that foreign country.

(3) For the purpose of this section, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

(4) The President may by a subsequent statutory order vary or revoke any order previously made under this section."

As things stand, there is no statutory order in existence which has been issued by the President in respect of South Africa pursuant to the provisions of section 3 of the Foreign Judgments (Reciprocal Enforcement) Act. Consequently, the only avenue available to a judgment creditor armed with a South African judgment is to seek to enforce it at Common Law by commencing an action founded on that judgment as a cause of action. That is precisely what the appellants

did when they commenced this action in the court below. The commencement of this action in the court below was in consonance with our decision in the **Melita Pakou**[1] case, where Ngulube, CJ (as he then was) stated at page 234 that:

> **"The law which applies in this country in default of any statute is the Common Law of England..."**

And further at page 235, he stated as follows:

> **"At Common Law, the judgment of any competent foreign court for a sum certain is enforceable as a simple debt on the basis of an implied obligation which arises on the part of the judgment debtor."**

We therefore have no hesitation in concluding that it was a serious misdirection on the part of the trial judge to hold that the process used by the appellants in commencing a fresh action to enforce the South African judgment was devoid of any legal basis. Quite obviously, the reasoning by the High Court judge is contrary to the settled principle of law as we have illustrated above. Ground three must therefore succeed.

The appellants' complaint under ground two is that the lower court was at fault by rendering a decision without disclosing how

incorrect the procedure employed by the appellants to commence the action was. According to the learned counsel, the lower court denied the appellants an opportunity to profer appropriate grounds of appeal against its ruling by withholding the reasons for its decision that the appellants ignored the provisions of the Foreign Judgment (Reciprocal Enforcement) Act at their own peril. In particular the trial judge simply said this in his ruling at page R5:

> **"I, therefore, have no difficulty in finding the process used by the Plaintiffs of commencing a fresh action by way of writ of summons accompanied by a statement of claim to register in Zambia a foreign judgment as devoid of any legal basis. The Plaintiffs ignored the provisions of the Foreign Judgment (Reciprocal Enforcement) Act, Chapter 76 of the Laws of Zambia at their own peril."**

We cannot agree more with Mr. Sianondo that the trial judge did not give reasons as to how the Foreign Judgments (Reciprocal Enforcement) Act was infringed. If we may add, the trial judge did not disclose the appellants' omissions that resulted in their alleged violation of the Act. In our view, the trial judge's clearly misdirected himself by not giving a reasoned decision. Needless to underscore, a judge should not leave the parties surmising as to how he/she arrived at a particular decision. In other words, a judge must not

confine the reasons to himself/herself; he/she must make the reasons known to the parties to enable them appreciate how a particular decision was arrived at. This ground also succeeds.

The first ground criticizes the trial judge for setting aside the default judgment and the originating process in the absence of an application to that effect and without hearing the parties on the same. In the words of the learned counsel for the appellants, the court below volunteered a ruling.

In concluding his ruling, the trial judge stated as follows at page R5:

> **"Further, in view of all the foregoing, I am compelled to invoke the inherent jurisdiction which this court always has to control proceedings before it to, inter alia, ensure that court process is not abused and accordingly make the following order:**
>
> **(a) The judgment in default of appearance with defence entered by the Deputy Registrar on 4th May 2016 is set aside for irregularity.**
>
> **(b) The Plaintiffs' action commenced by Writ of Summons accompanied by a Statement of Claim on 26th November 2015 I is wholly dismissed for abuse of court process"**

The record of appeal clearly shows that the application for determination by the trial judge was an *ex parte* summons for leave

to issue a writ of possession to facilitate the sale of Stand No. 1292 Chelstone, Lusaka. However, instead of confining himself to this specific application, the trial judge went beyond his jurisdiction by making decisions on matters that had not been canvassed by the parties, under the guise of 'inherent jurisdiction'. We must emphasise here that the so-called 'inherent jurisdiction' of a trial judge must not be exercised willy-nilly but with caution and judiciously. If in his judgment, the trial judge was of the view that there was some irregularity in the manner the default judgment was obtained and that there was an abuse of the court process, he ought to have requested the parties, particularly the appellants who had filed the application he was considering, to address him on the issues he had in mind but had not been presented by any of the parties, before making the orders he made.

On the facts and circumstances of this matter, we agree with counsel for the appellants that the trial judge volunteered a ruling. In the **John Mugala and Kenneth Kabenga**[3] case, we deprecated this conduct by trial judges when we stated that:

> **"It is most undesirable for a trial judge to volunteer a ruling especially without affording the parties advance notice of what the judge has in**

mind and giving them the opportunity to address him. The better practice is to make a ruling only when the defence make a submission and even then, the judge should be slow to make a decision on the evidence before he has heard it all."

On the strength of the principles enunciated in the above case, we must fault the trial judge for setting aside the default judgment and wholly dismissing the entire action. We also find merit in ground one.

In the final analysis, we find that the trial judge's reasoning was demonstrably wrong. As all the grounds of appeal have succeeded, we allow the appeal. Costs shall abide the outcome in the court below.

M. MALILA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

N. K. MUTUNA
SUPREME COURT JUDGE