Selected Judgment No.29 of 2017

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IN THE SUPREME COURT OF ZAMBIA	APPEAL NO.207/2014
HOLDEN AT LUSAKA	SCZ/8/164/2014
(CIVIL JURISDICTION)	
BETWEEN:	
INDENI PETROLEUM REFINERY CO. LTD	APPELLANT
AND	
KAFCO OIL LIMITED	1ST RESPONDENT
ANDREW BUNGONI	2ND RESPONDENT
SILAS MUMBA	3RD RESPONDENT
EMMANUEL SHIKAPUTO	4TH RESPONDENT

Coram : Hamaundu, Malila and Mutuna, JJS.

On 11th July 2017 and on 14th July 2017

For the Appellant : Mr. J. L. Kabuka of Messrs J. Kabuka & Company

For the Respondents : N/A

J U D G M E N T

Mutuna, JS, delivered the judgment of the court

Cases referred to:

1) **Chendaeka v The Municipal Council of Luanshya (1969/HK/160)**
2) **In The Matter of Charles Matakala Sikuka (1978) ZR 138**
3) **Mohammed Mauza v The Attorney General (1988/89) ZR 8**
4) **Leonard Banda v Dora Siliya and Nevers Mumba, SCZ judgment No.20 of 2013**
5) **Blay Pollard v Morris (1930) 1KB 625**
6) **Musa A.D. Yousuf v Mahtami Group of Companies & three others (2011) 1ZR 278**
7) **Finsbury Investments Limited v Antonio Ventriglia, Manuel Ventriglia and Ital Terrazo Limited (In receivership) SCZ Judgment No.42 of 2016**

Other authorities referred to:

1) **Rules of the Supreme Court 1999, volume 1**
2) **Atkins Court Forms, by Lord Evershed, volume 8(3), 2011, Butterworths London**
3) **Halsbury's Laws of England by Lord Hailshaw of St. Marylebone, 4th edition, volume, Butterworths, London.**

The Zambian court system has its genesis in the English court system and as such, our courts to a large extent enjoy the same jurisdiction as the courts in England. However, confusion normally arises in respect of the jurisdiction of the High Court of Zambia when compared to that of the High Court of Justice in England

because the structure of our High Court was not, until recently, similar to the structure of the High Court of Justice in England.

In the ruling that is the subject of this appeal, the court below, as often happens, was called upon, once again, to restate the jurisdiction of the High Court of Zambia in relation to the High Court of Justice in England. This is the primary issue that confronts us in this appeal, and though not novel, it is a significant issue in determining the practice and procedure in the court below. The other issue that falls for determination relates to the discretion, if any, of the High Court to table an issue for consideration that is not raised by the parties.

In resolving the primary issue, we have made no reference to the ***Constitution*** (as amended) which

introduces Divisions in the court below because the dispute arose prior to the enactment of the ***Constitution*** (as amended).

The background to the appeal is that the Appellant is engaged in the business of processing, refining and selling petroleum products to various oil marketing companies throughout Zambia. One such oil marketing company which the Appellant sold oil products to was the First Respondent between 30th January, 2006 and 23rd February 2006. As a result of the said sales, the First Respondent was indebted to the Appellant in the sum of K1,374,206,709.32 (un-rebased), prompting the Appellant to demand payment. After the First Respondent failed to settle the amount claimed, the Appellant commenced an action against the First Respondent claiming the amount in dispute and simultaneously sought a mareva injunction to

restrain the First Respondent from removing or disposing of its assets in Zambia until judgment. The Learned High Court Judge seized with the conduct of the matter granted the mareva injunction *ex-parte* initially, and subsequently confirmed it after an *inter partes* hearing.

Later in the proceedings on 6th December, 2010, the Appellant moved the Learned High Court Judge by way of a notice of motion, pursuant to Order 52 rule 4 of the ***Rules of the Supreme Court*** (***White Book***), for an order of committal for contempt of court against the Second, Third and Fourth Respondents. Upon receipt of the process, the Learned High Court Judge scheduled a status conference at which he was informed that the dispute had been settled in respect of the claim for K1,374,206,709.32 and that the only issue pending before him was in respect of the motion for committal for contempt of court. The Learned High

Court Judge duly set the matter down for hearing of the motion on 10th June 2014 and on that day he requested counsel for the parties to address him on the issue whether the motion for contempt of court was properly presented in view of the fact that there appeared to be no leave of the court obtained prior to filing it in line with Order 52 rule 2 of the ***White Book***. In response counsel for the Appellant informed the Learned High Court Judge that he recalled that leave had been granted earlier but could not immediately confirm as he did not have the whole file on the matter. He therefore, sought an adjournment to enable him check his record and revert to the court. The Learned High Court Judge graciously granted the adjournment and at the next sitting counsel for the Appellant informed him that leave had not been sought prior to the filing of the notice of motion, as such, non was granted. He, however,

proceeded to argue that the lack of leave did not render the motion incompetent because such leave was only necessary if the application was commenced before a Divisional Court. According to counsel, since there is no Divisional Court in Zambia, he was prompted to make the application pursuant to Order 52 rule 4 of the ***White Book*** which is the applicable rule in Zambia. Counsel argued further that in terms of Order 52 rule 4 of the ***White Book***, there is no requirement for leave to be obtained prior to the filing of a motion for contempt of court. He took the position that leave was not necessary because the application was made to a court other than a Divisional Court. That is to say, the High Court for Zambia is not a Divisional Court. He relied upon ***Atkins Court Forms***, volume 8(3) of 2011, paragraph 26.

Counsel for the Third Respondent who was present at the hearing did not respond to the arguments. However, all the Respondents had caused to be filed affidavits opposing the substantive application before the court, being the motion for contempt of court.

After the learned High Court Judge considered the arguments he found the issue that fell for determination as being whether or not leave to commence contempt proceedings is a mandatory requirement and which sub-rule of Order 52 of the ***White Book*** was applicable to the motion that was before him. He then summarized the arguments advanced by counsel for the Appellant and concluded that counsel conceded that leave is a mandatory requirement before a Divisional Court and that the motion was anchored on Order 52 rule 4 because it was directed at a court other than a Divisional Court. The Learned High

Court Judge stated further that counsel's position was that the constitution of a High Court in Zambia by a single judge is a departure from the constitution of a Divisional Court in England.

Arising from the foregoing summation of the arguments, the Learned High Court Judge posed the question, whether in the Zambian jurisdiction the High court can be said to be a court other than a Divisional Court of England? Put differently, can the High Court of Zambia exercise the jurisdiction exercised by the Divisional Court of England? In answer to the question posed, the Learned High Court Judge began by acknowledging that the issue had been considered before by the courts of Zambia and then he went on a journey of reviewing the provisions of the ***Constitution*** and ***High Court Act*** on the jurisdiction of the High Court and decisions of the court

below and those of this court, such as, the cases of ***Chendaeka v The Municipal Council of Luanshya[1], In The Matter of Charles Matakala Sikuta[2], Mohammed Muazu v The Attorney General[3]*** and ***Leonard Banda v Dora Siliya and Nevers Mumba[4].*** He concluded that the High Court of Zambia exercises the same powers, authority and jurisdiction as the Divisional Court in England. He accordingly dismissed the application with costs, prompting this appeal presented on 4 grounds as follows:

1) **The Learned Judge in the court below misdirected himself both in law and fact when he held that the original jurisdiction of the High Court in Zambia is equivalent to the appellate jurisdiction of the Divisional Court of the High Court in England**
2) **The Learned Judge in the court below misdirected himself by holding that committal proceedings before the High Court in Zambia whether or not in exercise of original jurisdiction must be instituted under the provisions of Order 52 rule 2 of the rules of the Supreme Court 1999 white book ("Applications to divisional Court") and thereby summarily dismissed proceedings that had been instituted under the provisions of Order 52 rule 4 RSC ("Applications to court other than Divisional Court').**

3) **In the exercise of its inherent jurisdiction to act judiciously and in the best interest of justice the lower court erred for failing to take into account the effect of;**

   (i) **Non objection of the parties to the application being made under Order 52 rule 4 RSC and their submission to the jurisdiction of the court by filing Affidavits on the merits of the substantive application; and**

   (ii) **The partial hearing of the substantive application by other Judges of the High Court before whom the matter had earlier been allocated when it summarily dismissed the application at its own motion purportedly for non compliance with the procedural requirements under 0.52 Rule 2 RSC.**

Before the hearing of the appeal the parties filed heads of argument. Counsel for the Appellant, Mr. J. L. Kabuka relied on the Appellant's heads of argument in prosecuting the appeal and he also made viva voce submissions. The Respondents' counsel was not in attendance despite there being ample evidence to show that process in respect of the date scheduled for the hearing of the appeal had been served upon them. We, therefore, proceeded with the hearing and took note of the heads of arguments filed.

Counsel for the Appellant Mr. J.L. Kabuka, argued grounds 1 and 2 together and in doing so he explained the jurisdiction, practice and procedure adopted in the High Court of Zamia with reference to section 9(1) of the ***High Court Act*** and section 10(1) of the ***High Court (Amendment) Act, No.7*** of ***2011***. The former states in part as follows:

> **"The court shall be a Superior Court of Record and in addition to any other jurisdiction conferred by the Constitution and by this or any other written law, shall within the limits and subject as in this Act mentioned, possess and exercise all jurisdiction, powers and authorities vested in the High Court of Justice in England".**

While the latter states in part as follows;

> **"The jurisdiction of the court shall, as regard practice and procedure, be exercised in the manner prescribed in this Act ... or any other written law, or by such rules orders or directions of the court as may be made under this Act ... or such written law and in default thereof in substantial conformity with the Supreme Court Practice 1999 (White Book) of England, and subject to subsection (2) the law and practice applicable in England in the High Court of Justice up to 31st December 1999".**

Counsel then recounted his version of the events that occurred in the court below prior to the Learned High Court Judge inviting the parties to comment on the mode of commencement of the motion that: the application was made pursuant to Order 52 rule 4 of the ***White Book*** for the court below to exercise its original jurisdiction to punish for contempt; and, that after the application was partially heard by the Judge to whom it was initially allocated, it was re-allocated to the Learned High Court Judge who heard it *denovo* and summarily dismissed it on the ground that it was incompetent for want of compliance with Order 52 rule 2 of the ***White Book***. He then posed two questions, the first of which was whether the court below was sitting as a Divisional Court and argued that according to the learned author of ***Halsbury's Laws of England*** volume 10, 4th edition, the Divisional Court in England

exercises its original jurisdiction only in relation to applications for prerogative orders. This practice, he argued, has been adopted by the High Court of Zambia within the context of the *lacuna* acknowledged to exist in our law in the ***Chendaeka*** and ***Charles Matakala Sikutu*** cases which the Learned High Court Judge relied upon. Counsel took the position that although the Divisional Court is part of the High Court of Justice in England, its principal jurisdiction is appellate.

The second question posed by counsel was whether the court below was sitting in a capacity other than that of a Divisional Court? He took the view that in the exercise of its original jurisdiction the High Court other than the Divisional Court may entertain an application for contempt of court as stipulated under Order 52 rule 4. Once again

counsel referred us to the learned author of ***Halsbury's*** and quoted a passage as follows:

> **"The original jurisdiction of the High Court is general; it extends to all causes of action and is unlimited. It includes the whole of the original jurisdiction of the courts mentioned in the preceding paragraph [i.e. the Family Division, the Queen's Bench Division, and the Chancery Division]".**

He also referred to section 4 of the ***Supreme Court of Judicature (Consolidation) Act*** 1925 which states that the jurisdiction vested in the High Court belongs to all the divisions alike. By the foregoing argument, we understood counsel to be saying that because the High Court of Zambia exercises jurisdiction enjoyed by all Divisions of the High Court of Justice in England, the court below in adjudicating upon the motion was exercising such jurisdiction and not just the jurisdiction reserved for the Divisional Court which is limited to appeals and applications for prerogative orders. Therefore, when it

exercises its jurisdiction as such court, it is not required to grant leave before it hears a motion for contempt.

In relation to the ***Leonard Banda*** case, counsel argued that our decision that a Divisional Court in England is equivalent to High Court in Zambia was not the *ratio decidendi* of the case. We cannot, therefore, rely on it in determining this appeal.

In regard to ground 3 which questions the summary dismissal of the motion by the court below, counsel for the Appellant took the view that it is not the function of the courts to raise and decide on issues that are not presented by the parties. Counsel was essentially saying that the Learned High Court Judge should not have invited the parties to address him on the competence of the motion laid before him, but rather should have proceeded to hear

the motion. He referred us to the English case of ***Blay v Pollard & Morris***[5], which states as follows:

> **"In the present case the issue on which the Judge decided was raised by himself without amending the pleadings and in any opinion he was not entitled to take such course".**

Arguing in the alternative, counsel submitted that even assuming the commencement of the motion pursuant to Order 52 rule 4 of the ***White Book*** was irregular, the irregularity did not render the proceedings a nullity because it was open to the court below to order the correction of the error in accordance with Order 2 of the ***White Book***. He, in this regard, also referred us to a decision of the High Court in the case of ***Musa A.D. Yousuf v Mahtani Group of Companies & three others***[6] in which the court below observed that the aggressive power of striking out proceedings should be sparingly exercised

by the trial court where the best option is to allow an amendment to cure a procedural defect.

Counsel concluded arguments under ground 3 by referring us to the notes of the proceedings in the court below, which he argued, reveal that the motion for contempt of court was partially heard by the Judge before whom it was initially presented. There was, in the view taken by counsel, no basis, therefore, to dismiss the motion by the Learned High Court Judge.

We were urged to allow the appeal.

In response, the Respondents in arguing grounds 1 and 2 essentially endorsed the reasoning and findings by the court below. They also emphasized the fact that our decision in the ***Leonard Banda*** case puts the matter

beyond dispute by clarifying that a Divisional Court in England is equivalent to a High Court in Zambia.

As regards ground 2, the arguments were two-fold. Firstly, that it is not true that the substantive application was partially heard by the Judge it was initially allocated to. This, it was argued, is evident from the record which reveals that the application was adjourned for various reasons each time it came up prior to the Learned High Court Judge taking conduct of the matter.

The second limb of the arguments addressed the summary dismissal of the application notwithstanding the Respondents' acquiescing to its hearing. It was argued that the court has jurisdiction to determine whether it has jurisdiction to adjudicate upon a matter before it.

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We have had occasion to consider the record of appeal heads of argument, *viva voce* arguments by counsel and the ruling appealed against. In making our determination of this appeal we are of the firm view that grounds 1 and 2 of the appeal can be tackled together because they raise one issue which is the determination of the jurisdiction of the High Court of Zambia as against a Divisional Court of the High Court of Justice in England. As the court below rightly observed, this issue has been litigated upon before and there are a number of judicial pronouncements made on the issue by this and the court below. We, therefore, do not intend to go beyond what we said in the ***Leonard Banda*** case which is that a Divisional Court in England is equivalent to a High Court in Zambia. In that case we also made a determination as to whether leave is required prior to moving a motion for contempt before this court and held

that, unlike in the court below, leave is not required in this court. What this means is that, when a party seeks to make an application for committal for contempt before the High Court the same must be commenced in accordance with Order 52 rule 2 of the ***White Book***. This is not only in line with the case law referred to by the Learned High Court Judge but also the practice and procedure that our High Court has adopted for a longtime now.

To the extent that we discussed the jurisdiction and practice in the court below in contempt proceedings in the ***Leonard Banda*** case, our decision on jurisdiction of the court below in respect of Order 52 did form part of the *ratio decidendi*. Mr. Kabuka's argument to the contrary is, therefore, untenable.

Consequently, grounds 1 and 2 are, bereft of merit and we accordingly dismiss them.

Ground 3 relates to the summary dismissal of the matter by the Learned High Court Judge. It has been argued by the Appellant that: the High Court cannot of its own motion hear and summarily dismiss a substantive application in the manner it did; the Respondents had submitted to the jurisdiction of the court below in respect of the motion before the court by filing affidavits in opposition, as such, the court below was obliged to hear it; and, the error in commencement of the motion, if at all there was one, is curable and the court below ought to have ordered an amendment of the pleadings.

In response, the Respondents' position was that the Learned High Court Judge was on firm ground in dismissing the motion.

In determining this ground of appeal we are compelled to say what we said in the case of ***Finsbury Investments Limited v Antonio Ventriglia, Manuel Ventriglia and Ital Terrazo Limited (in receivership)***[7] as follows:

> **"The High Court Rules are couched in a manner that all actions before that court are Judge driven, which entails that a Judge of that court has the responsibility of ensuring that all actions before him are stirred to their logical conclusion promptly. In doing so, the High court has the responsibility of ensuring that it adopts the quickest method of disposing of a matter before it, justly and having, afforded the parties an opportunity to be heard. To achieve this, there is built in the practice and procedure of the High Court and indeed appellate courts, a system whereby, an obviously hopeless, frivolous or vexations matter may be dealt with at interlocutory stage without having to await a full hearing. This ensures that there is a saving on the already overstretched resources of the court and indeed that matters are disposed of at least cost to the parties".**

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This practice, in our considered view, is aimed at ensuring that there is proper case flow and case management of matters before the court below which eventually leads to the proper administration of justice. A robust Judge, such as the Learned High Court Judge, must ensure that he is alert and invokes the inherent jurisdiction vested in him of weeding out hopeless, frivolous and vexatious matters and those wrongly presented before him after giving the parties an opportunity to be heard. He is not deprived of the duty of exercising this discretion based on the fact that a party has submitted himself to the proceedings whose commencement has been called into question because the mere fact of submitting to such proceedings does not cure the defect nor does it amount to acquiescence to the defect. We, as a result, decline to accept the argument by Mr. Kabuka, in this

regard. Further, in recognition of the judges inherent jurisdiction, aforestated, Order 14A rule 1 of the ***White Book*** permits a Judge as the Learned High Court Judge did, to raise an issue on his own motion and indeed dismiss the substantive matter if the determination of the issue substantially disposes of it. The order states, as follows;

> **"The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that -**
>
> **a) Such question is suitable for determination without full trial of the action**
>
> **b) Such determination will finally determine (subject only to any possible appeal), the entire cause or matter or any claim or issue therein.**
>
> **2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.**
>
> **3) The court shall not determine any question under this Order unless the parties have either -**
>
> **(a) Had an opportunity of being heard on the question, or**

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(b) Consented to an order or judgment on such such determination ..."

(The underlining is ours for emphasis only).

The explanatory notes to the foregoing Order under Order 14A rule 2 sub-rule 2 of the ***White Book*** indicate that **... the court may proceed to make such determination at any stage of the proceedings** ... which, in our considered view, means that it can be made at the stage which the Learned High court Judge made it. The same notes under Order 14A rule 2 sub-rule 3 set out the conditions precedent for employing the procedure as follows:

1) **The defendant must have given notice of intention to defend;**
2) **The question of law or construction is suitable for determination without a full trial of the action**
3) **Such determination will be final as to the entire cause or matter or any claim or issue**
4) **The parties had opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination**

The facts we have set out in the earlier part of this judgment indicate that all the four requirements aforestated, were met. We say this because: the Respondents did indeed intimate their intention to defend by filing the affidavits in opposition; the question for determination was also suitable for determination without a trial or hearing because its determination hinged on the interpretation of the law, practice and procedure and not findings of fact; its determination also resolved the matter with finality because it rendered the hearing of the substantive application *otiose*; and, the court did indeed invite the parties to address it on the issue prior to rendering its ruling.

In our determination of ground 3 we have also considered the English case of ***Blay v Pollard*** referred to us by

counsel for the Appellant and find that it does not aid the Appellant's case. The reason for this is that the circumstances in that case were totally different from the circumstances in this case. The facts of this case reveal that after the Learned High Court Judge noted an error in the manner in which an application before him was commenced, he invited the parties to address him on whether or not the matter was properly before him. In doing so, he identified a question for the parties to address him on.

In the ***Blay*** case, the parties had filed pleadings before the Judge upon which pleadings he was supposed to make a determination. When rendering his decision, the Judge departed from the pleadings and awarded a remedy he was not called upon to award. Hence the finding by the

appellate court that the Judge raised the issue by himself *"without amending the pleadings"* as per the quotation in the earlier part of this judgment.

In regard to the argument by counsel for the Appellant that the omission, if at all it was there, of proceeding by way of Order 52 rule 2 of the ***White Book*** was in any event curable, we decline to consider it because it was not raised in the court below. Counsel was adamant in his arguments in the court below that he was on firm ground in proceeding by way of Order 52 rule 4 of the ***White Book*** and did not present any arguments in the alternative urging the court below to cure the defect if it found that there was indeed a defect. This is notwithstanding the fact that this avenue was open to him in view of the provisions of Order 2 of the ***White Book***.

The same fate befalls the argument in respect of ground 3(ii) alleging that there was a partial hearing of the application by the Judge who dealt with the matter prior to its reallocation to the Learned High Court Judge. The arguments in respect of that ground were not presented in the court below, as such cannot be raised on appeal. This is quite apart from the fact that the record reveals that what Mr. Kabuka referred to as prehearings were not prehearings of the application but rather motions to adjourn the application.

The net result of our findings is that all the three grounds of appeal having been found to be unmeritorious, we uphold the judgment of the court below and dismiss the

appeal with costs. The same are to be taxed in default of agreement.

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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Dr. M. MALILA, SC
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE