

Selected Judgment No. 17 of 2017

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IN THE SUPREME COURT OF ZAMBIA APPEAL NO.144/2014
HOLDEN AT KABWE SCZ/8/166/2016
(Civil Jurisdiction)

BETWEEN:

GDC LOGISTICS ZAMBIA LIMITED APPELLANT

AND

JOSEPH KANYATA AND 13 OTHERS RESPONDENTS

CORAM: Mambilima, CJ and Kaoma and Kajimanga, JJS

On: 6th April, 2017 and 26th April, 2017

For the Appellant: Mr. C.M. Sianondo - Malambo and Company

For the Respondents: Mr. G.D. Chibangula – GDC Chambers

JUDGMENT

KAOMA, JS delivered the Judgment of the Court

Cases referred to:

1. **National Airports Corporation Limited v Mines Air Services Limited (T/A Zambian Airways) [2011] 2 ZR 180**
2. **Zambia Privatization Agency v Huddle Chisenga Chibichabo and another (2005) Z.R. 74**
3. **Standard Bank Limited v Brocks (1972) Z. R. 306 (H.C)**
4. **Zambia Consolidated Copper Mines v Matale (1995/1997) Z.R. 144**
5. **N.B. Mbazima and others as Joint Liquidators of ZIMCO Limited (in liquidation) v Reuben Vera – SCZ Judgment No. 6 of 2001**

Statutes and works referred to:

1. **Industrial Relations Court Rules, Cap 269, rule 38**

2. **Osborn's Concise Law Dictionary, 10th edition, page 224**
3. **Industrial and Labour Relations Act, Cap 269, ss. 85 and 85A (d)**
4. **High Court Rules, Cap 27, Order 26**
5. **Constitution of Zambia (Amendment) Act No. 2 of 2016, Article 118 (2)(e)**

The respondents were employees of the appellant. They were summarily dismissed from employment on 17th October, 2012 after being charged with “inciting and or taking part in unconstitutional industrial action” by withdrawing their labour without following the laid down procedure and violation of section E. 9.1 (29) of the Collective Agreement. On 14th December, 2012 they filed a notice of complaint in the Industrial Relations Court (IRC) alleging that the dismissals were wrongful and they seek numerous reliefs.

On 28th May, 2013 they applied for an order of interim attachment of property pursuant to **Rule 38 of the Industrial Relations Court Rules, Cap 269** on account of an alleged manifest intention on the part of the appellant to wind up its business in Zambia. The appellant opposed the application stating that it was still a going concern without any intention of winding up business in Zambia and that the order sought by the respondents was not tenable. The lower court granted the interim attachment of

property, thus this appeal. The appellant has advanced three grounds as follows:

1. **The Court below erred both in law and in fact when it granted an order of interim attachment when the condition precedent to granting of such an order did not subsist.**
2. **The Court below erred both in law and fact when it granted an interim attachment order in the absence of evidence.**
3. **The Court below erred both in law and fact when it granted the order of interim attachment when the said order could not be granted as final order in the proceedings.**

Counsel for the parties advanced a number of arguments in respect of the three grounds of appeal. However, we shall not deal with these arguments in any detail at this stage, as we hold the view that the main issue, which was raised in the lower court, but which the court did not fully consider is one of the jurisdiction of the IRC to grant interim attachment. This argument has been repeated before us in ground 3 of this appeal. Therefore, we shall deal with ground 3 first because if we allow this ground, the other two grounds will be rendered otiose.

In support of ground 3, counsel for the appellant first cited **Rule 38 of the Industrial Relations Court Rules** which provides:

“The Court may, on the application of any party, make, as an interim order, any order which under the Act it could make as a final order in the proceedings”.

Counsel then submitted that an order for interim attachment of property is intended to act as an interim remedy to assist the applicant to secure the execution of a judgment in the event that the matter is ruled in their favour.

He quoted the definition of interim order in **Osborn’s Concise Law Dictionary, 10th edition** as **“an order made in the course of proceedings, not being a final order ... intended to last for a limited period only”**. Counsel also referred to the meaning of the word ‘**interim**’ as explained by the High Court in the case of **National Airports Corporation Limited v Mines Air Services Limited (T/A Zambian Airways)¹**.

It was submitted that an order for interim attachment of property is one equally intended to last only for a limited period until final determination of the main matter and is not capable of later being made a final decision of the court. Further, that the wording of rule 38 indicates that an interim order that can be

granted by the court must be one that is envisaged by the Act as capable of being a final decision of the court.

It was also argued that the IRC has jurisdiction to award various remedies under **section 85 of the Industrial and Labour Relations Act** and to make any other order as it may consider fit in the circumstances of the case under **section 85A (d)**, but the type of order that was granted does not fall under the provisions of sections 85, 85A and or rule 38 which envisages that orders that the IRC can grant under the Act and the rules are those that are intended to be final or establishing the clear rights of the parties.

It was further contended that the High Court is specifically clothed with jurisdiction under **Order 26 of the High Court Rules, Cap 27** to grant interim attachment but there is no such provision in the Industrial and Labour Relations Act and the lower court was trying to exercise powers that are not supported by any specific provision in the Act.

Counsel cited the case of **Zambia Privatization Agency v Huddle Chisenga Chibichabo and another**² where we held that the IRC cannot review or vary or correct its own final judgment. It was

argued that this Court clearly indicated that the power of review was reserved for the High Court even though the IRC has had its powers widened by virtue of sections 85 and 85A. That in the same way the IRC cannot make an order for interim attachment in the absence of any specific provision in the Act and the Rules.

In addition, counsel cited the case of **Standard Bank Limited v Brocks**³ which the lower court associated itself with in granting the interim attachment and submitted that the court did not even give any proper reasoning as to why such decision was reached.

In response to ground 3, counsel for the respondents contended that the lower court did not err when it granted the interim attachment as it has jurisdiction and authority to do so in the interest of justice. It was submitted that rule 38 clothes the IRC with jurisdiction and discretionary powers to make an order of interim attachment and that under **rule 55**, nothing in the Court Rules, shall be deemed to limit the IRC to make such an order as may be necessary for the ends of justice.

Counsel argued that it is pursuant to this mandate to do substantial justice, that the general power to make any order,

including an interim attachment, where the court deems it necessary to do so, would not be prejudicial to the interests of the parties, particularly that such an order is of temporary nature and does not touch on the main rights and liabilities of the parties and no evidence has been adduced by the appellant, to prove prejudice.

Furthermore, it was submitted that some of the reliefs sought are of monetary nature and in the most likely event that the lower court decides the matter in favour of the respondents, but if it is eventually found that the appellant has no assets in Zambia to sufficiently satisfy the judgment, the respondents are likely to suffer grave injustice, irreparable loss and damage. That it is as a result of such grave injustice, that the lower court deemed it necessary, in the interest of justice to all the parties, to grant the interim attachment pending determination of the main matter.

Counsel for the respondents distinguished the case of **Zambia Privatization Agency v Huddle Chisenga Chibichabo and another**¹ from this case on the basis that the law relating to that case pertaining to the IRC reviewing its own final judgment does not apply to the facts of this case and **rules 38 and 55 of the**

Industrial Relations Court Rules expressly give the IRC extensive powers to make any interim orders in the interest of justice.

It was also argued that in the event that upon final adjudication of the matter, the lower court enters judgment in favour of the respondents, there is nothing precluding the court from ordering seizure and sale of any property of the appellant in Zambia as a final order to satisfy the judgment debt, pursuant to the court's mandate to do substantial justice, in the event that the appellant cannot liquidate the debt

In his viva voce response, counsel for the respondents added that the case of **Zambia Consolidated Copper Mines v James Matale**⁴, which the lower court had cited, gives the lower court general and exclusive jurisdiction to grant interim attachment; and that the court was alive to the fact that it has its own rules. Further, that **Article 118 (2)(e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016** provides that the court should not have undue regard to technicalities of rules and that since the IRC is now a division of the High Court, if we were to hold that it

has no jurisdiction to grant interim attachment, we would be setting a dangerous precedent.

We have considered the arguments by counsel on this ground of appeal. The provisions of the Industrial and Labour Relations Act cited by the parties in this appeal are not in dispute. What is in dispute is the applicability of sections 85 (5) and 85A (d) and the interpretation of rule 38. Clearly, under **section 85 (5)**, the IRC is not bound by the rules of evidence. The main object of the court is to do substantial justice between the parties before it. We said this in the **James Matale**⁴ case. However, we have also made it very clear that substantial justice is for both the complainant and the respondent and not only for the complainant.

We also agree with the respondents that in terms of section 85A (d), the court is mandated to make any other order or award as it may consider fit in the circumstances of the case. And under rule 55, nothing in the Court Rules shall be deemed to limit the court to make such an order as may be necessary for the ends of justice.

The application for interim attachment was made under rule 38 of the Court Rules which provides as follows:

“The Court may, on the application of any party, make, as an interim order, any order which under the Act it could make as a final order in the proceedings”. (Underlining ours for emphasis only)

We must ascertain whether an order of interim attachment is an order, which under the Act, the IRC can make as a final order in the proceedings. The question is not just whether the IRC has power to make interim orders, as final orders, as put by the lower court. It is questionable whether the IRC has the jurisdiction to make an interim attachment. There is an argument by the appellant that it has no power to do so.

We could find no case in which we considered the existence of the IRC's power to attach property but we should state right now that if our interpretation of rule 38 would be that the IRC has no jurisdiction to attach a respondent's property, we do not see how we would be setting a dangerous precedent. There is no inherent power in the IRC to grant such order. The power must be given by statute.

Quite rightly, in the **James Matale**⁴ case, we said that the general jurisdiction of the IRC and the expansive extent of it is manifest in section 85 under various subsections which cumulatively, confer a sufficient jurisdiction unrestrained by

technicalities under which real justice can be dispensed. We further stated that the mandate in subsection 5 which required that substantial justice be done does not in any way suggest that the IRC should fetter itself with any technicalities or rules.

Furthermore, **Article 118 (2)(e) of the Constitution** provides that justice shall be administered without undue regard to procedural technicalities. However, even though the IRC is now a division of the High Court, it is still guided by its own Court Rules and certainly, the question now before us does not relate to procedural technicalities. It is one of interpretation of the rule under which the court was moved to make the interim attachment.

Perhaps we should begin with a definition of interim attachment. This is a provisional or temporary relief which allows the plaintiff to attach the defendant's property, whilst a court action progresses. It effectively restricts a defendant's ability to deal with the attached property in their possession pending the outcome of the action. As rightly put by Doyle, C.J, in the case of **Standard Bank Limited v Brocks**³, at page 307, which the lower court applied, the remedy which a plaintiff has to protect his future

chances of payment lies under Order XXVI of the High Court Rules, namely, an interim attachment and such attachment can, of course, only be issued where a defendant is about to remove or dispose of the property with intent to obstruct or delay execution of any decree that may be passed against him.

Contrary to the argument by the respondents that after the final hearing and determination of the matter the lower court can confirm the interim attachment as an order of attachment absolute, the position we take is that once a final judgment is passed, interim attachment does not convert to attachment in execution; a charge for payment and further attachment, for example, under a writ of eligit is required before the attached property can be used in the execution of the judgment.

In the case of **Zambia Privatization Agency v Huddle Chisenga Chibichabo and another**², we held that the IRC cannot review, vary or correct its own judgment after rendering such judgment as there is no provision for review under the Industrial and Labour Relations Act. Although that case is distinguishable from this case on the facts, and even if rules 38 and 55 of the Court

Rules expressly give the IRC extensive powers to make any interim orders in the interest of justice, we are not persuaded that the IRC can make an order of interim attachment as a final order in the proceedings, especially that touching on land, as in this case.

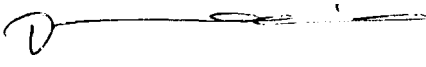
In the case of **N.B. Mbazima and others Joint Liquidators of ZIMCO Limited (in liquidation) v Reuben Vera**⁵ we dealt with the issue of whether the jurisdiction of the IRC extends to conveyancing matters. The present case is not a conveyancing matter, but what we said in that case will also inform our decision in this matter. In that case, the respondent had sought before the IRC declaratory relief that as a sitting tenant/occupant of the flat in issue he was entitled to the first option to purchase it. The IRC held in his favour and ruled that because of discrimination, the sale of the flat to Charity Kowa was null and void. On appeal, we held that:

“Quite clearly Section 85 (2) and 108 of the Industrial and Labour Relations Act, show that the jurisdiction of the Industrial Relations Court is limited to settling of labour disputes falling under the Act. It is an alternative forum to the High Court only in cases of labour disputes. The IRC has limited but exclusive jurisdiction in such labour disputes as provided in Section 85 (2) and 108 of the Industrial and Labour Relations Act, Cap 269. In our view, in those proceedings before the Industrial Relations Court and even the present proceedings before us, the respondents were and are impugning the certificate of title issued to Miss Charity Kowa under

the Industrial and Labour Relations Act. The IRC has no jurisdiction in conveyancing matters. Such issues can only be dealt with by the High Court.

... We wish also to state that in any matter where there is uncertainty as to whether the issues to be decided are of a conveyancing nature or labour disputes, it is advisable that parties should proceed before the High Court, which court would deal with all these issues at the same time. The IRC, therefore, lacked jurisdiction in this matter ...”

On the basis of all the foregoing, we reiterate that the IRC lacks jurisdiction to make an order of interim attachment as a final order in the proceedings under the Act. On this ground alone the appeal succeeds and there is no need for us to deal with the other grounds of appeal. The order made by the lower court is set aside. The costs will follow the event, in default of agreement to be taxed.


I.C. MAMBILIMA
CHIEF JUSTICE


R.M.C. KAOMA
SUPREME COURT JUDGE


C. KAJIMANGA
SUPREME COURT JUDGE