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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 208/2014**
HOLDEN AT KABWE **SCZ/8/207/2014**
(Civil Jurisdiction)

IN THE MATTER OF:	**SECTION 10 AND 11 OF THE ARBITRATION ACT NO. 19 OF 2000**
AND	
IN THE MATTER OF:	AN APPLICATION BY ZIMBABWE MINING DEVELOPMENT CORPORATION FOR THE REMOVAL OF STUART ISAACS, SC AND MR. JUSTICE MEYER JOFEE AS ARBITRATORS

BETWEEN:

AMAPLAT MAURITUIS LIMITED	1ST APPELLANT
AMARI NICKEL HOLDINGS ZIMBABWE LIMITED	2ND APPELLANT
STAURT ISAACS, SC	3RD APPELLANT
MR. JUSTICE MEYER JOFEE	4TH APPELLANT

AND

ZIMBABWE MINING DEVELOPMENT CORPORATION	RESPONDENT

CONSOLIDATED WITH

IN THE MATTER OF:	RULE 23 OF THE ARBITRATION (COURT PROCEEDINGS) RULES, STATUTORY INSTRUMENT NO. 75 OF 2001
IN THE MATTER OF:	SECTION 17 (2) (A) (II) OF THE ARBITRATION ACT NO 19 OF 2000
AND	
IN THE MATTER OF:	AN ARBITRAL AWARD IN CASE NO 17720/ARP/MD/TO OF THE ICC INTERNATIONAL COURT OF ARBITRATION

BETWEEN:

AMAPLAT MAURITUIS LIMITED	1ST APPELLANT
AMARI NICKEL HOLDINGS ZIMBABWE LIMITED	2ND APPELLANT

AND

ZIMBABWE MINING DEVELOPMENT CORPORATION — 1ST RESPONDENT

THE CHIEF MINING COMMISSIONER, MINISTRY OF MINES OF ZIMBABWE — 2ND RESPONDENT

CORAM: Mwanamwambwa, DCJ., Hamaundu, Kabuka , J.J.S.
On the 1st of August, 2017 and 12th January, 2018

For the Appellant: *No appearance*
For the Respondent: *No appearance*

J U D G M E N T

Mwanamwambwa, DCJ., delivered the Judgment of the Court.

Cases referred to:

1. **JCN Holdings Limited v. Development Bank of Zambia SCZ Judgment No. 22 of 2013**
2. **Datson Siulapwa v Faless Namusika (1985) ZR 21**
3. **Daws v Daily Sketch & Sunday Graphic Ltd [1960] 1 All ER 397**

Legislation referred to:

1. **The High Court Act, Chapter 27 of the Laws of Zambia, section 23 and Order 3 rule 5.**
2. **The Rules of the Supreme Court, 1999, Rule 4.**
3. **Halsbury's Laws of England, 4th Edition, volume 37, paragraph 131**

For convenience, we shall refer to the parties by name and not by designation of "Appellant" or "Respondent" as is always the case.

This is an appeal against an order of consolidation of two actions and an order of transfer of a matter from one Judge to another.

The background to this matter is that on the 22nd of November 2007, Zimbabwe Mining Development Corporation, hereinafter referred to as "ZMDC", entered into a Memorandum of Understanding (MoU) with the Amari Nickel Holdings Zimbabwe, hereinafter referred to as "Amari", for the joint prospecting for Nickel. On the 25th of July 2008, ZMDC entered into another MoU with Amaplat Mauritius Limited, hereinafter referred to as "Amaplat", to prospect for Platinum and related metals and to develop a mine. The two MoUs were concluded by Mr. M.J. Nunn on behalf of Amaplat and Amari and by Mr Dominic Mubaiwa on behalf of ZMDC.

By a letter dated 10th November 2010, from ZMDC to Amaplat and Amari, ZMDC pulled out from the MoUs, alleging that there was "a corrupt relationship which unduly influenced

the signing of the Platinum MoU." Further, that there was "no Joint Venture Agreement regulating the relationship." ZMDC stated in its letter that the relationship terminated for both the Platinum and Nickel properties.

By a letter dated 22nd November 2010, Amaplat and Amari disputed ZMDC's entitlement to terminate the MoUs and insisted that they remained legally binding.

The MoUs had arbitration clauses. As a result, Amaplat and Amari referred the matter to the International Court of Arbitration (ICA) for arbitration. The ICA set up an arbitral Tribunal in terms of the Rules of that Court. The 3rd Appellant in the first matter, Mr Stuart Isaacs, QC of the United Kingdom was nominated by the United Kingdom ICC National Committee as Chairman. The 4th Appellant in the first matter, Justice Meyer Joffe of South Africa, was nominated by Amaplat and Amari as co-arbitrator. Mr James Prince Mutizwa of Zimbabwe was nominated by ZMDC as co-arbitrator. On the 12th of May 2011, the ICA appointed Lusaka, Zambia as the seat of arbitration. Despite this, the matter was set down for hearing in Cape Town, South Africa, from the 13th of August to the 24th of August 2012.

The hearing commenced in Cape Town. ZMDC was suspicious of some of the questions posed by Judge Joffe to an Amaplat witness. They asked Judge Joffe to recuse himself. They also asked Mr. Stuart Isaacs, QC, to recuse himself, after he refused to determine a jurisdictional challenge brought by ZMDC. On the 27th of September 2012, the ICA dismissed the application asking Judge Joffe and Mr. Isaacs to recuse themselves.

As a result of the above events, on the 15th of October 2012, ZMDC commenced an action in the Zambian High Court, by way of originating summons, under cause number 2012/HP/1213, for the following reliefs:

1. **A declaration that Judge Joffe and Mr. Stuart Isaacs, QC have conducted themselves in a manner that raised doubts as to their impartiality and that they demonstrated biasness or a perception of biasness;**
2. **An order for the removal of Judge Joffe and Mr. Stuart Isaacs, QC, as arbitrators in the dispute between the ZMDC and Amaplat and Amari;**
3. **An order for an injunction to restrain Judge Joffe and Mr. Stuart Isaacs, QC, from acting as Arbitrators in the dispute between ZMDC and Amaplat and Amari;**
4. **Legal costs for and relating to this issue; and**

5. Further or other relief.

Before the matter was heard, ZMDC applied for an order of interim injunction to restrain Judge Joffe and Mr. Stuart Isaacs, QC, from continuing to act as Arbitrators. On the 15th of October 2012, the learned trial Judge (herein after referred to as the "first Judge") granted the application *ex parte.*

Upon hearing the matter *inter partes,* the first Judge reserved her ruling.

On the 19th of June 2014, the first Judge delivered her ruling. She found that under sections 10 and 11 of the Arbitration Act No. 19 of 2000, she had no jurisdiction to deal with this matter. Accordingly, she declined to confirm the order of interim injunction granted *ex parte* and she discharged it.

Meanwhile, before the Ruling on the *inter partes* hearing for an interim injunction was delivered, there was back and forth communication between the parties on whether the hearing of the arbitration proceedings should continue in light of the *ex parte* order of injunction. On the 24th of June 2013, Judge Joffe Meyer resigned his appointment citing the conflict that was presented by the fact that other members of the Tribunal were

intending on proceeding with the hearings despite the injunction. Mr. Prince Mutizwa, ZMDC's nominee, had resigned on the second day of hearing following a purported determination by the Tribunal of the bias challenge. The ICA Secretariat appointed replacements and the Tribunal proceeded. ZMDC did not attend these hearings and were not represented. On the 12th of January 2014, the Tribunal rendered its award in favour of Amaplat and Amari and ordered ZMDC to pay the Respondent damages amounting to US$42,882,000 and US$3,900,000 legal costs and costs of the arbitration and interest.

On the 30th of May 2014, ZMDC and the Chief Mining Commissioner of the Ministry of Mines in Zimbabwe, took out a second action in the Zambian High Court against Amaplat and Amari. This action was under cause number 2014/HP/ARB/011. ZMDC and the Chief Mining Commissioner sought the following reliefs:

> **"an order that the Arbitral award delivered by Stuart Isaacs, QC, Prof. Doug Jones and Mr Chikwenda Madumere on 12th January 2014, be set aside on the grounds that the Applicants did not participate and were unable, for just**

cause, to participate in the proceedings that led up to the afore mentioned award."

This second matter went before another Judge, hereinafter referred to as the "second Judge".

On the 3rd of June 2014, the second Judge ordered that the two actions be consolidated. This order reads as follows:

> **"UPON HEARING COUNSEL FOR THE APPLICANTS;**
>
> **IT IS HEREBY ORDERED AND DIRECTED THAT: Proceedings under cause No. 2014/HP/ARB 11 be consolidated with the proceedings under cause No. 2012/HP/1213 AND All issues arising in relation thereto, INCLUDING any applications whatsoever, shall be referred to be heard and determined by the Hon. Mrs Justice F. M. Lengalenga."**

On the 19th of June 2014, the first Judge ordered the transfer of cause No. 2012/HP/1213 to the second Judge. This order is as follows:

> **"PURSUANT to the order for consolidation of cause numbers 2014/HP/ARB 11 and 2012/HP/1213 made by my brother Hon. Justice M. Chitabo, SC, on 3rd June 2014, cause number 2012/HP/1213 is hereby transferred to the Hon. Justice M. Chitabo, SC pursuant to section 23 of the High Court Act, Cap 27 of the Laws of Zambia.**

FURTHER, any applications arising from the consolidated causes shall be determined by the aforementioned Hon. Judge."

Amaplat and Amari were unhappy with the above two orders. They have appealed to this court on the following two grounds.

Ground one

The proceedings in the Court below are a nullity due to the fact that the transfer of files between the two learned High Court Judges was in breach of section 23 of the High Court Act, Chapter 27 of the Laws of Zambia and were done without the guidance or involvement of the Judge-in-charge

Ground two

The court below erred in law when it consolidated the two causes of action without a hearing and without considering the fact that the effect was to have one party suing itself.

On the date of hearing of this appeal, both parties were not represented. The Appellants had filed heads of argument earlier on and filed a notice of non-attendance. The Respondents however, did not file any heads of argument.

In ground one of the appeal, it was submitted, on behalf of the Appellant, that the proceedings in the court below are a

nullity due to the fact that the transfer between the two judges was in breach of section 23 of the High Court Act. That the transfer was done without the guidance or involvement of the Judge-in-Charge. Section 23 (1) of the High Court Act, Chapter 27 of the Laws of Zambia was referred to. It provides as follows:

> **23. (1) Any cause or matter may, at any time or at any stage thereof, and either with or without the application of any of the parties thereto, be transferred from one Judge to another Judge by an order of the Judge before whom the cause or matter has come or been set down:**
>
> **Provided that no such transfer shall be made without the consent of the Judge to whom it is proposed to transfer such cause or matter.**

It was argued that in **JCN Holdings Limited v Development Bank of Zambia** [1], this Honourable Court had occasion to construe Section 23 (1) of the High Court Act. That Chibesakunda, Ag CJ, who delivered the judgment of the Court stated that-

> **"As can be seen from Section 23(1) of the High Court Act, which we have already reproduced in this judgment, it is incontestable that, at any stage of the proceedings, a matter may be transferred from one High Court Judge to another High Court Judge. That where circumstances requiring a**

matter to be transferred from one Judge to another arise, the transfer can be initiated by the Judge himself or herself. The transfer can never, however, be instigated by a receiving Judge even if that Judge is a Judge-in-Charge.

However, it is important to note that Section 23(1) requires that the Judge transferring the matter should make an order to that effect."

It was stated that Chibesakunda, Ag CJ outlined the modalities of transferring a file pursuant to Section 23 of the High Court Act, as follows:

"Administratively, the practice in Zambia is that the Judge who has recused himself of herself must hand over the matter to the Judge-in-Charge for reallocation to another Judge. For the Commercial List, the handover is supposed to be made to the Deputy Judge-in-Charge, who is the Judge-in-Charge of the Commercial List....Additionally, a scrutiny of the said records establishes that, contrary to the requirements of Section 23(1) of the High Court Act, there was no order by Wood, J transferring this matter from himself to Kajimanga, J, for reallocation to another Judge.....We must state that the statutory provisions relating to recusal and transfer of matters between Judges are important provisions aimed at avoiding forum shopping and ensuring transparency in the dispensation of justice. So a breach of these provisions is not a mere breach of

procedural rules but is an infringement which goes to the jurisdiction of the Court..."

It was submitted that there was no acceptance in writing by the Second Court, of the transfer of the First Action from the First Court. The Appellant noted, however, that in the ruling refusing leave to appeal, the lower Court confirmed that it verbally accepted the transfer, without the involvement of the Judge-in-Charge.

It was pointed out that while the lower Court subsequently indicated its acceptance of the first action in the ruling refusing to grant leave to appeal, the other irregularities like failure to go through the Judge in Charge make this subsequent acceptance insufficient to regularize the transfer.

The heads of argument went on to state that in accordance with the interest of transparency enunciated by Chibesakunda, Ag CJ in the **JCN Holdings** case, the Transfer Order, insofar as it referred to the Consolidation Order, which was not on the record of the First Action, was questionable.

It was argued further that the meeting between the two Judges on the subject of transfer without the involvement of the

Judge-in-Charge was irregular and did not go far in upholding the principle of transparency. That in the case of **Datson Siulapwa v. Faless Namusika** [2], Commissioner Musumali, as he then was, stated the following:

> **"Judicial officers i.e. Local Court Justices, Magistrates and Judges should always remind themselves of the maxim: justice must not only be done, but be seen to be done. This principle should in fact be the guiding principle of all people or organs of our society whose functions involve the hearing and determination of disputes, complaints and/or accusations before they make decisions in favour of one party against the other. In this particular case because of the stand taken by the learned Magistrate, justice was not seen and could not be seen to have been done. It is my view that justice which is not seen to be done or could not be seen to have been done is no justice at all."**

That in the Appellants' eyes justice was neither done nor seen to have been done. The Appellants stated that as held in the **JCN Holdings** case, the irregular transfer resulted in the Judge not having jurisdiction to hear and determine the matter. It was argued that it is settled law that if a matter is not properly before a Court that Court has no jurisdiction to make any orders or grant any remedies.

In ground two, the Appellant submitted that the consolidation order was irregular. The Appellants cited paragraph 4/9/2 of the Learned authors of the Rules of the Supreme Court 1999 Edition (the **White Book**") where they say that-

> **"But no order for consolidation will be made without hearing all parties affected, and therefore it will only be made on the hearing of applications in all actions (Daws v Daily Sketch)"**

That in terms of practice, Paragraph 4/9/6 of the White Book reads as follows:

> **"The applications should be made as soon as possible by summons or on the hearing of the summons for directions if the application has not been made before. A separate summons should be issued in each action proposed to be consolidated, or one summons may be issued provided it fully sets out the title of each such action. The principle is that the actions to be consolidated or tried together should be before the Court at the same time..."**

That in this case, no summons was ever issued in the first action to alert the first Court, or notify the Appellants and the other parties before it for them to make representations for or against consolidation. They added that when the order for

consolidation was made, only the second action was before the consolidating court.

It was pointed out that in fact, no summons was ever issued in the second action either, and the Appellants were consequently not heard on the question of consolidation. That only the Respondents herein, during the ex parte application, were heard on the question.

The Appellants stated that to the extent that the lower Court issued an order purporting to direct how the first action would proceed, without a summons issued in that action, the second lower Court had no jurisdiction to make such an order. They cited **Daws v. Daily Sketch & Sunday Graphic Ltd** [3] to support this argument. That in that case the Court held that:-

> **"in the absence of any summons in the first action the court had no jurisdiction to make an order in the second action purporting to direct how the first action should proceed."**

They added that the lack of summons in the first action was fatal. The Appellants went on to submit that unlike in the **Daws case**, the parties in the first action and second action did not have common advocates. They argued that in the first action, the

3rd and 4th Appellants were not represented. Further, that the Appellants' advocates in the second action were not even informed that an application to consolidate would be made.

They went on to submit that at paragraph 4/9/2 of the Rules of the Supreme Court 1999 Edition (the "**White Book**"), the learned authors explain that-

> **"Two actions cannot be consolidated where the plaintiff in one action is the same person as the defendant in another action, unless one action can be ordered to stand as a counterclaim or third party proceedings in another action."**

It was stated that in the first action, one of the Respondents is the Chief Mining Officer of the Republic of Zimbabwe while the said Chief Mining Officer of the Republic of Zimbabwe is an applicant in the second action. They contended that this is irregular, and contrary to the principles of consolidation.

That the first action includes Stuart Isaacs, QC, as "3rd Respondent", and Mr. Justice Meyer Joffe as "4th Respondent", which two parties are not involved in the second action. The Appellants submitted that on the strength of difference in parties also, that the Consolidation Order was bad at law.

Further, that a scrutiny of the reliefs sought in the first action and second action, reveals that they are different and concern different matters.

They argued that the two actions are not proper for consolidation and that the lower Courts misdirected themselves.

As we have already stated above, there were no heads of argument filed on behalf of the Respondents.

We have looked at the evidence on record and considered the submissions filed and authorities cited.

Ground one of the appeal challenges the order of transfer of the first action to the second judge. We agree with the submission by counsel for the Appellant that section 23 of the High Court Act, governs transfers of causes of actions between courts. This section provides that-

"23. (1) Any cause or matter may, at any time or at any stage thereof, and either with or without the application of any of the parties thereto, be transferred from one Judge to another Judge by an order of the Judge before whom the cause or matter has come or been set down:

Provided that no such transfer shall be made without the consent of the Judge to whom it is proposed to transfer such cause or matter."

What we understand from this section is that there should be an order from the Judge transferring the matter and also that the Judge to whom the matter is transferred to, should consent to the transfer.

In the case before us, there was an order of transfer from the first judge to the second judge. In addition, the record of appeal shows that the second Judge consented to the transfer of the matter. We say so because in the Ruling refusing leave to appeal by the second Judge, he stated the following:

"I confirm that after my order of consolidation, I conversed with my sister Judge and I consented to the transfer of the case to myself. It was for that reason that I gave return date for the hearing of the main application because I had consented."

Further, it seems to us that the Appellants acknowledged this consent because at paragraph 2.7 of their heads of argument, they state the following:

"While the lower Court has subsequently indicated its acceptance of the First Action in the ruling refusing to grant

leave to appeal, we contend that the other irregularities like failure to go through the Judge-in-Charge make this subsequent acceptance insufficient to regularize the transfer."

Counsel argued that a transfer of an action should involve the Judge-in-charge of the High Court as was held in the JCN Holdings case. We agree that a transfer of a matter should involve the Judge-in-charge. However, this is an administrative check that has been put in place. It has no backing of the law.

In addition, we wish to point out that the transfer of the case in the **JCN Holdings** case is distinguishable from the case at hand. In the JCN Holdings case, there was no transfer order made by the transferring Judge. The holding that the transfer was irregular was not because of the lack of involvement of the Judge-in-charge but the failure to follow procedure set out under section 23 of the High Court Act. In that case it was held that-

"We must state that the statutory provisions relating to recusal and transfer of matters between Judges are important provisions aimed at avoiding forum shopping and ensuring transparency in the dispensation of justice. So a breach of these provisions is not a mere breach of

procedural rules but is an infringement which goes to the jurisdiction of the Court."

We held that the Court to which the JCN Holdings matter was transferred to had no jurisdiction because the statutory provisions relating to recusal and transfer where not followed. By statutory provisions, we meant provisions of the law **contained in a Statute**. The involvement of the Judge-in-Charge before a matter is transferred to another Judge is not provided for in any statute. Accordingly, we do not agree with the Appellants that the interpretation of our holding in the JCN Holdings case is that a transfer of a matter without the Judge-in-charge is irregular Therefore, the omission does not make a transfer of a matter irregular. What is important is that the provisions of section 23 of the High Court Act are adhered to. And as we have discussed above, the requirements were complied with.

Accordingly, ground one of the appeal fails for lack of merit.

We now come to the ground of appeal challenging the consolidation order. The law on consolidation of causes of action is provided for under Order 3 rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia. It provides that-

"5. Causes or matters pending in the Court may, by order of the Court or a Judge, be consolidated, and the Court or a Judge shall give any directions that may be necessary as to the conduct of the consolidated actions."

The above rule does not provide the procedure that is supposed to be used when consolidating matters. It only sets out the power of the Court to consolidate matters.

However, Order 4 rule 9, Rules of the Supreme Court, 1999 also provides for consolidation. This order provides that-

"(1) where two or more causes or matters are pending in the same Division and it appears to the Court-

(a) That some common question of law or fact arises in both or all of them, or

(b) That the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or

(c) That for some other reason it is desirable to make an order under this paragraph

The Court may order those causes or matters to be consolidated on such terms as it thinks just or may order the two be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them."

On the effect of the rules, the rules provides that-

> **"but no order for consolidation will be made without hearing all parties affected, and therefore it will only be made on the hearing of applications in all actions"**

On practice, the rules provides that-

> **"the application should be made as soon as possible, by summons, or on the hearing of the summons for directions if the application has not been made before. A separate summons should be issued in each action proposed to be consolidated, or one summons may be issued provided it fully sets out the title of each such action. The principle is that the actions to be consolidated or tried together should be before the court at the same time..."**

From the above, it is clear that the rule recognises the fact that parties that may be affected by an order of consolidation should be heard before an order is made.

In the case before us, the consolidation order is clear to the effect that only ZMDC was heard before the order was made. Amaplat and Amari did not make any representations to the Court as regards the consolidation. In fact, this was only in the second action. Further, no summons were issued in either the first or second action for the hearing of an application to

consolidate. Consequently, the Respondents were not heard as regards the consolidation. The above events clearly offend the provisions of Order 4 rule 9 of the Rules of the Supreme Court, 1999, cited above. This order requires that parties that are likely to be affected by the consolidation of matters be heard before any order of consolidation is made. We wish to point out that the overriding consideration before consolidating matters is whether costs and time will be saved as a result. **See: Halsbury's Laws of England, 4th Edition, volume 37, paragraph 131**. However, this consideration, in our view, should only be made after hearing all the parties involved. This was not done. The consolidation was, therefore, irregular.

As regards the argument that the consolidation order could still not take effect because one party, the Chief Mining Officer of Zimbabwe that was "the applicant" in the first matter was "the Respondent" in the second matter, we hold the view that the submissions on this issue are inviting us to address the argument on whether the consolidation was proper on the merits. This is not what this appeal is about. Delving into this argument

will pre-empt the main matter before the High Court. Therefore, we shall not deal with it.

Since we have stated that procedure was not followed in consolidating the matters, ground two of the appeal, therefore, succeeds.

Despite what we have said above, the transfer was academic because the consolidation order, on which the transfer was predicated, was irregular. The net effect therefore, is that the appeal succeeds and we accordingly allow it. We order that the matters be sent back to the High Court for hearing before two other Judges.

We order each party to bear their own costs.

M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

E.M. HAMAUNDU
SUPREME COURT JUDGE

J.K. KABUKA
SUPREME COURT JUDGE