IN THE SUPREME COURT OF ZAMBIA **SCZ/8/25/2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

CLEVER MPOHA **1st APPLICANT**
SAVENDA MANAGEMENT SERVICES LTD **2nd APPLICANT**

Vs

ETS RWASA SALVATOR **RESPONDENT**

Coram: E. M. Hamaundu, JS

For the applicants: Mr A. Kasolo, Messrs Mulilansolo Chambers, Mr K. Nchito, Messrs Kapungwe Nchito & Associates, Mrs C. Mponda, Messrs Bemvi Associates and Mr M. Sinyangwe, Messrs Abercorn Chambers

For the respondent: Mr K. Simbao and Ms N. Simbao, Messrs Mulungushi Chambers

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Cases referred to:

1. **Makula International Limited v His Eminence Cardinal Nsubunga & Another, Court of Appeal No. 1981/4-1982**
2. **Motlasi Pelesa v Ngaka Molouoa, C of A (CIV) No. 36/2020**
3. **Coral Leisure Group Ltd v Barnett [1981] I.C.R 503** at **509**
4. **Bidvest Food Zambia Limited & Others v CAA Import and Export Limited, Appeal No.56/2017**
5. **R v Secretary of State for Trade and Industry, Exp. Eastway (2001) 1 All E.R.27**

Legislation referred to:

1. **Court of Appeal Act, No.7 of 2016**

Works referred to:

Chitty on Contracts (General Principals), 32nd Edition, London; Sweet & Maxwell

The two applicants seek leave to appeal to this court against the judgment of the Court of Appeal.

The respondent, ETS RWASA SALVATOR, is a company incorporated and operating in the Republic of Burundi. The 1st applicant is a shareholder and Director of the 2nd applicant, Savenda Management Services Ltd, a company operating in the Republic of Zambia. In March, 2012, the respondent, in a transaction involving the two applicants as well as one Didier Leon Kaoma and his Company, D.L. Kaoma Import and Export Limited, bought rice from Zambia amounting to about 1000 metric tonnes. The respondent was unhappy with the quality of rice that the sellers intended to deliver, and promptly rejected it. The respondent then sued for the purchase price, which was broken down into two sums of money namely US$221,000 and ZMW700,000.

In defence, the two applicants distanced themselves from the transaction, saying that the sale had been entirely between the respondent on one hand and Didier Leon Kaoma and his company, on the other. The facts that emerged during trial were that the rice was paid for in two consignments in the said sums of US$221,000 and K700,000 respectively. Of particular relevance to this application is the latter sum. It was said, by the parties, to be the Zambian Kwacha equivalent of a sum of US$135,000 which the respondent paid for the second consignment. In this application, the applicants say that when the respondent's Manager was giving evidence during the trial, it was put to him in cross-examination that he had smuggled the sum of US$135,000 into Zambia and that the Manager had conceded to the allegation.

The trial judge did not agree with this allegation and instead found that there was no evidence to prove that the appellant brought into the country the sum of US$135,000 in cash. However, the judge upheld the argument by the two applicants that they were not party to the transaction, and he went further to hold that the respondent had not satisfactorily shown that the quality of the rice supplied did not meet the standard of the sample that had been

shown to him. In other words, the respondent had no grounds to reject the rice. The respondent's claim was therefore dismissed entirely.

The respondent appealed to the Court of Appeal. That Court reversed the trial court's finding that the transaction was only between the respondent, on one hand, and D.C. Kaoma and his company D.L. Kaoma Import and Export Ltd, on the other. Instead the Court of Appeal held that there was a lot of evidence on record which revealed direct involvement in the transaction of the two applicants, as well. The court pointed out evidence of personal commitment on the part of the applicants to fulfill the contract. It pointed to the evidence which showed that the total metric tonnes supplied was 1,147 and to an acknowledgment by the 2nd applicant of the receipt of a sum of K700,000. The court reached the conclusion that the 2nd applicant received the sum of US$135,000 from the appellant.

On those grounds, the Court of Appeal found that the two applicants were part of the transaction as co-adventurers. The Court also found that, on the correspondence available on record, there was evidence that the respondent inspected the rice at

Mpulungu Port before rejecting the consignment. Consequently, the court upheld the respondent's claim, including some consequential damages. It is against this judgment that the two applicants wish to appeal.

The proposed grounds of appeal are as follows:

1. **The Court of Appeal erred in law and fact when it found that there were two distinct transactions without conclusively determining the liability of the parties, as there were two distinct transactions, two distinct contracts and four distinct respondents (defendants) as parties to the proceedings.**
2. **The Court of Appeal erred in law and fact when it found that the appellant had paid the 2nd and 4th respondents (now the two applicants) US$135,000. The decision of the Court of Appeal is anchored on perjured evidence because it was the 3d respondent who paid the 4th respondent by telegraphic transfer the amount of K700,000 and not the appellant.**
3. **The Court of Appeal erred in law and fact in rendering its judgment per incuriam of the law.**
4. **The Court of appeal erred in law and fact when it ignored or glossed over the self-confessed illegality by the appellant that he illegally brought US$135,000 into the country, which ought to have been interrogated by the Courts as this wounded his credibility.**

5. **The Court of appeal erred in law and fact when it reversed the findings of fact by the High Court Judge without following the principles on the reversal of findings of fact.**

6. **The Court of Appeal fell in grave error by relying on the evidence of a discredited witness who had confessed to smuggling foreign currency into Zambia.**

On behalf of the applicant, learned counsel has argued that; (i) the intended appeal raises a point of law of public importance; (ii) the appeal has reasonable prospects of success, and; (iii) there are other compelling reasons for it to be heard.

On all these grounds, the main point on which the applicants rely is the alleged existence of illegality in the contract. According to the applicants, the sum of US$135,000 that was paid for the second consignment of rice was brought into the Country by the respondent without going through the Country's legal financial system; in other words, the said sum of money was smuggled into Zambia and paid directly to the supplier. Citing the cases of **Makula International Limited v His Eminence Cardinal Nsubanga & Another**[1], a Ugandan case cited as Court of Appeal No. 1981/4-1982 and also the case of **Motlasi Pelesa v Ngaka Molouoa**[2], a case in Lesotho, cited as C of A (CIV) No. 36/2020, counsel has

argued as follows: that it is an established position of law that illegality can be raised at any time before a court of law and it should be investigated; that a court of law cannot sanction what is illegal; and that, once illegality is brought to the attention of the court, it overrides all questions of pleading, including admissions made thereon.

On behalf of the respondent, counsel has argued that the issue of illegality that the applicants are raising does not satisfy the threshold under Section **13** of the **Court of Appeal Act** because it was not raised both in the High Court and Court of Appeal.

I have considered the above submissions. **Section 13** of the **Court of Appeal Act** (citing only portions relevant to this application) provides:

> **"(3) The Court may grant leave to appeal where it considers that–**
> **(a) the appeal raises a point of law of public importance;**
> **(c) the appeal would have a reasonable prospect of success; or**
> **(d) there is some other compelling reason for the appeal to be heard".**

As regards illegality in a contract, the learned authors of **Chitty on Contracts (General principles)** wrote:

> **"Illegality will only preclude the enforcement of the contract where it has been:**
> **'***entered into with the purpose of doing [an]...unlawful or immoral act or the contract itself (as opposed to the mode of ....performance) is prohibited by***' "**

For that rule, the authors quoted a passage from the case of **Coral Leisure Group Ltd v Barnett**[3].

Hence, even if what the applicants allege is true, their argument is not persuasive because it is defeated *ab initio* by the fact that the purpose for the contract itself was not illegal. In my view therefore the fact of illegality, on the peculiar facts of this case, does not meet the threshold in **Section 13** of the **Court of Appeal Act**.

Other than the issue of illegality, the proposed grounds of appeal indicate that the applicants intend to challenge the Court of Appeals judgment mainly on questions of fact. In the case of **Bidvest Food Zambia Limited & Others v CAA Import and Export Limited**[4], the full bench of this court, following the decision in **R V Secretary of State for Trade and Industry, Exp. Eastway**[5], said that, with the creation of the Court of Appeal as an intermediate court between the High Court and this court, the latter must necessarily concentrate its attention on a relatively small

number of cases recognized as raising legal questions of general importance: it cannot seek to correct errors in the application of settled law, even where such are shown to exist.(*underlining mine for emphasis*).

It is my considered view that the law on issues concerning findings of fact has been settled for several decades now. There is nothing new that the proposed grounds will raise.

I therefore conclude that the proposed appeal does not meet the threshold in **Section 13**. This application will hence stand dismissed, with costs to the respondent.

Dated ..... 22nd day of..... February .....2022.

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E.M. Hamaundu
SUPREME COURT JUDGE