Selected Judgment No.42 of 2016

P.1533

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.148/2016**

HOLDEN AT KABWE **SCZ/8/95/2016**

(Civil Jurisdiction)

BETWEEN:

FINSBURY INVESTMENTS LIMITED **APPELLANT**

AND

ANTONIO VENTRIGLIA **FIRST RESPONDENT**

MANUEL VENTRIGLIA **SECOND RESPONDENT**

ITAL TERRAZZO LIMITED (In receivership) **THIRD RESPONDENT**

Coram : Malila, Kajimanga and Mutuna JJS

On 2nd November 2016 and 16th November 2016

For the Appellant : Mr. J.P. Sangwa SC, Messrs Simeza Sangwa & Associates

For the First & Second Respondents : Mr. C. Sianondo, of Messrs Malambo & Co.

J U D G M E N T

Mutuna, JS delivered the judgment of the court.

Cases Referred to:

1) *Bellamano vs Ligure Lambarda Limited (1976) ZR 267 (S.C.)*
2) *Kelvin Hang'andu and Company (A Firm) v Webby Mulubisha (2008) ZR 82 Vol. 2 (S.C)*
3) *Mutale v Munaile S.C .Z Judgment No.14 of 2007*
4) *Jones and Another v Zahedi (1993) Ch.D. 12.*

5) *BP Zambia Plc v Interland Motors Limited (2001) ZR 37*
6) *United Engineering Group Limited vs Mackson Mungalu and Others SCZ Judgment No.4 of 2007*
7) *Re JN 2 Limited (1977) 3 ALL ER 1104*
8) *Republic of Peru v Peruvian guano Co. (1886) 36 Ch. D*
9) *New Plast Industries v. The Commissioner of Lands and the Attorney General SCZ Judgment No. 8 of 2001*
10) *Zambia National Holdings Limited and UNIP v The Attorney General S.C.Z Judgment No. 3 of 1994*
11) *Re a Company (1974) 1ALL ER page 256*

Legislation Referred to:

1) *The Companies Act, Chapter 388 of the Laws of Zambia*
2) *The High Court Act, Chapter 27 of the Laws of Zambia*
3) *The Companies Winding Up Rules, 2004*
4) *The Constitution of Zambia Act, 1991*

Other Authorities Referred to:

1) *Supreme Court Practice, 1991 (White Book)*
2) *Black's Law Dictionary by Bryan A. Garner, 8th edition 92004), West Group United States of America*

This appeal originates from a ruling of the High Court sitting at Lusaka, pursuant to which, it dismissed the Appellant's motion to dismiss an application by the First and Second Respondents to strike out the Appellant's Petition that was before the court.

The ruling also gave directions regarding, among other things, the hearing of the First and Second Respondents' application to strike out the Petition.

The undisputed facts leading up to the appeal are that, the Appellant filed a Petition on 22nd May 2015 pursuant to section 272 of the ***Companies Act***, seeking to wind-up the affairs of Zambezi Portland Cement Limited and the grant of any order the court may deem fit. Following the service of the Petition upon the First and Second Respondents, the two filed a motion to strike out the Petition pursuant to section 9 of the ***High Court Act***, section 275(2)(j) of the ***Companies Act*** and Order 18 rule 19 of the ***Supreme Court Practice, 1999 (White book).***

The motion which was supported by an affidavit and skeleton arguments, sought an order striking out the Petition on the following grounds:

P.1536

1) *That the Appellant is not vested with sufficient interest in Zambezi Portland Cement Limited (the company) to sustain its winding-up;*
2) *That the facts relied upon by the Appellant in seeking the winding-up of the company do not disclose any reasonable causes of action as against the Respondent or as against the parties served with the Petition or any of them;*
3) *The Petition does not disclose any ground upon which the court can order the winding-up of the company in terms of section 272 of the Companies Act and as such it does not disclose any reasonable cause of action; and*
4) *The Petition is otherwise an abuse of the process of the court.*

The Appellant's response to the motion was by way of raising a motion of its own, seeking the dismissal of the First and Second Respondents' motion on the ground that the court lacked jurisdiction to dismiss a Petition before it is heard in the light of the provisions of section 275(1) (a) of the ***Companies Act***.

After the Appellant's motion was filed the Learned High Court Judge, decided, in her wisdom, to hear and determine the said motion prior to considering the First and Second Respondents' motion to strike out Petition.

At the hearing of the motion the parties relied upon the skeleton arguments in support and opposition.

The Appellant's arguments were launched on two main fronts, namely, that: the motion as presented by the First and Second Respondents was irregular; and the court has no jurisdiction to dismiss a Petition under the ***Companies Act*** without it being heard.

In relation to the contention that the motion was irregular it was argued that the motion was improperly presented because it relied upon the wrong provisions of the law. Reliance was placed on the case of ***Ballamano v Ligure Lambarda Limited***[1], where we observed that it is always necessary, on making an application, for the summons or notice of application to contain a reference to the

order and rule number or other authority under which the relief is sought.

The Appellant's argument on the issue of the court's jurisdiction was twofold. In the first limb, it was argued that section 9 of the ***High Court Act***, which sets out the jurisdiction of the High Court, does not vest power in the High Court to dismiss a Petition under the ***Companies Act*** without it being heard on the merits. To augment this argument, reference was made to the case of ***Kelvin Hang'andu & Co. (A firm) v Webby Mulubisha***[2] where we held that the jurisdiction of the High Court is unlimited but not limitless.

It was also argued that Order 18 rule 19 of the ***White Book*** is not relevant to the application to dismiss Petition because, as we held in the case of ***Mutale v Munaile***[3], the term 'pleading' does not extend to or include a Petition.

The second limb of the argument was that the motion by the First and Second Respondents contravenes Rule 51 of the ***Companies Winding-Up Rules, 2004*** which states as follows:

"No proceedings under the Act or under the Rules shall be invalidated by any formal defect or irregularity under these rules unless the court before which the objection is made is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court".

It was argued that the First and Second Respondents ought to have moved their motion in accordance with Rule 51 of the ***Companies Winding-Up Rules*** and demonstrated to the court that the irregularity complained of is such that substantial injustice would be occasioned to them if the Petition were to be heard. Further that, the injustice would be such that no order of the court would remedy it.

It was also argued that section 275(2)(f) which the First and Second Respondents have relied upon does not support their motion. The section was quoted in part by the Appellant as follows:

P.1540

"The court may, on the Petition's coming on for hearing or at any time on the application of the Petitioner, the company or any other person who has given notice that he intends to appear on the hearing of the Petition.

(a) ...

(b) ...

(c) ...

(d) ....

(e) ...

(f) Give directions as to the proceedings as the court thinks fit.

It was argued that the literal interpretation to be given to the said section is that in order for a court to grant the remedy that the First and Second Respondents seek, it has to hear the Petition. That such a remedy cannot be granted before the Petition is heard. Further that, in order to appreciate the powers of the High Court in winding-up proceedings, one must read section 275(2) together with section 275(1) of the ***Companies Act***. It was also argued that the

Companies Winding-Up Rules do not make provision for interlocutory motions to dismiss a petition.

In response, the First and Second Respondents argued that the Appellant has misunderstood the effect of section 275(1)(a) of the ***Companies Act***. The section, it was argued, deals with the powers of the courts after the Petition has been heard. It does not prevent a court from determining applications to dismiss a winding-up Petition before the actual hearing of such Petition. Further that, it is not necessary to read section 275(2) together with section 275(1) of the ***Companies Act*** in order to understand the powers of the High Court in winding-up proceedings because the two sections are separate and not intertwined so as to warrant their being read together.

The First and Second Respondents argued further that it is absurd to argue that the law will not allow a court to dismiss a winding-up Petition even if it is patently flawed prior to a hearing being held. That the English case of ***Jones and another v Zahedi***[4]

has stated how a court should treat formal and substantive defects as follows:

> *"We do not doubt that the court may properly over look any technical, formal or insignificant failure to comply with the requirements of the schedule, and it may well be that the court need not take notice of any deficiency of which the paying party does not complain. But it would, in our opinion, be contrary to the interest and also the language of these regulations to hold that the court could properly make an order in favour of an applicant who has failed to comply with the schedule in a significant respect of which the Legal Aid Board complained, unless the applicant could show that he could not in all the circumstances comply with the schedule in the relevant respect".*

It was argued further that the correct interpretation to be given to section 275(2) (j) of the ***Companies Act*** is that it confers jurisdiction on the court to strike out and or dismiss a Petition before the hearing. This, it was argued, is based on the fact that, by

definition, as per ***Black's Law Dictionary***, one of the directions that a court can give under section 275(2)(f) is to hear a motion to dismiss the Petition for winding-up.

The First and Second Respondents went on to argue that the arguments by the Appellant that suggested that there is a vacuum in our law in relation to winding-up Petitions because the same do not provide for dismissal before hearing is untenable. They argued that there can be no vacuum in our law because section 10(1) of the ***High Court Act*** legislates against such a situation. The section states as follows:

> *"The jurisdiction vested in the court shall, as regards practice and procedure, be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, order or directions of the court as may be made under this Act or 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".

That the said section must be read with section 13 of the ***High Court Act***, which states as follows:

> *"In every civil cause or matter which shall come in dependence in the court, law and equity shall be administered concurrently, and the court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter so that, as far as possible, all matters in controversy between the said parties may be completely and finally be determined, and all multiplicity of legal proceedings concerning any of such matters avoided, and in all matters in which there is any conflict or variance between the rules of equity and the rules*

of common law with reference to the same matter, the rules of equity shall prevail".

It was argued that the foregoing sections of the ***High Court Act*** are fall back provisions if indeed there is a vacuum in the law in terms of dismissal of Petitions in winding-up proceedings, before a hearing.

As regards the provisions of order 18 rule 19 of the ***White Book*** it was argued that the interpretation ascribed to it by the Appellant is wrong because Order 18 rule 19(3) extends the application of Order 18 rule 19 to originating summons and Petitions. The order states as follows:

"This rule shall, so far as applicable, apply to an originating summons and a Petition as if the summons or petition, as the case may be, were a pleading".

Further that the case of ***Mutale v Munaile***[3] is quoted out of context by the Appellant because, as a court, we did not have occasion to pronounce ourselves on the scope of application of

Order 18 rule19(3) of the ***White Book*** in relation to winding-up Petitions.

In relation to section 9 of the ***High Court Act***, it was argued that the said section vests the High Court with inherent jurisdiction to exercise all powers and authority conferred upon it by the ***Constitution***. That in the circumstances of this case, the High Court is empowered to, *inter alia*, summarily determine a Petition and make any order it deems fit in order to protect the integrity of its process. Examples were given in this regard by reference to the cases of ***BP Zambia Plc v Interland Motors Limited***[5], ***United Engineering Group Limited v Mackson Mungalu and Others***[6], ***Re JN2 Limited***[7] and ***Republic of Peru v Peruvian Guano Company***[8].

These were the arguments presented to the Learned High Court Judge. After she considered the arguments, she dismissed the Appellant's motion with costs. The basis upon which she dismissed the motion was that she found that the High Court has inherent jurisdiction to hear any matter that comes before it unless

a statute or any rule limits that authority or grants exclusive jurisdiction to some other court or tribunal. The Learned High Court Judge found further that, the inherent jurisdiction of the High Court includes the power to hear an application or motion to strike out a winding-up Petition, notwithstanding the fact that the said jurisdiction is not specifically provided for in the ***Companies Winding-Up Rules***. She also found that Order 18 Rule 19(3) of the ***White Book*** can and may be used to strike out a winding-up Petition.

The Appellant is vexed by the ruling of the Learned High Court Judge, hence this appeal based on six grounds as follows:

1) *That the court below erred both in law and fact by holding that the cardinal issue was whether an application under Order 18 Rule 19(3) of the Rules of the Supreme Court may be made in a winding-up Petition*
2) *That the court below erred both in law and in fact by holding that Order 18 Rule 19(3) of the Rules of the Supreme Court can and may be used to strike out a winding-up Petition*

P.1548

3) *That the court below erred both in law and in fact by holding that where the winding-up rules are silent on a matter pending before the court the court must apply its own procedure where express provisions exist*

4) *That the court below erred both in law and in fact by holding that its inherent jurisdiction includes jurisdiction to hear an application or motion to strike out a winding-up Petition*

5) *That the court below erred both in law and in fact by holding that the First and Second Respondent's motion to dismiss the Petition was not irregular or untenable under the law*

6) *That the court below erred in fact and in law by dismissing the Appellant's motion to dismiss the First and Second Respondent's motion to dismiss Petition.*

The Appellant and Respondents filed heads of argument in support and in opposition to the appeal, respectively. They also augmented the heads of argument with *viva voce* arguments at the hearing of the appeal.

P.1549

The Appellant's heads of argument are essentially a repetition of the arguments advanced in the High Court except for slight additions under grounds 2 and 6. The addition under ground 2 is the argument that the Learned High Court Judge fell in grave error when she relied on Order 18 rule 19(3) of the ***White Book*** in view of our decision in the cases of ***Mutale v Munaile***[3] and ***New Plast Industries Limited v Commissioner of Lands and Another***[9]. In the latter case we held as follows:

> *"We have considered the submissions on this ground. In our view, it is not entirely correct that the mode of commencement of any action largely depends on the relief sought. The correct position is that the relevant statute generally provides the mode of commencement of any action. Thus, where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure".*

It was contended that arising from the decision aforestated, a court is bound to follow the law and procedure as prescribed by statute. That since practice and procedure in winding-up Petitions

is provided for in the ***Companies Act*** and ***Companies Winding-Up Rules*** the lawfulness or otherwise of winding-up proceedings can only be determined in the context of the two pieces of legislation and not the ***White Book***.

The addition under ground 6 related to a reference to ***Article*** 94(1) of the ***Constitution*** prior to its amendment (which was applicable at the time of lodging the application) on the jurisdiction of the High Court. Reference was also made to our decisions in the case of ***Zambia National Holdings Limited and United National Independence Party (UNIP) v the Attorney General***[10] in which we interpreted the jurisdiction of the High Court in relation to Article 94(1).

In the *viva voce* arguments counsel for the Appellant, Mr. J.P. Sangwa SC, argued that the jurisdiction of the High Court in winding-up proceedings is derived from the ***Companies Act*** which does not provide for dismissal of a winding-up Petition before it is heard. Further that, any attempt by the High Court to depart from the provisions of the ***Companies Act*** amounts to the court

exercising legislative functions which are in the preserve of Parliament.

We were urged to allow the appeal.

The First and Second Respondents' heads of argument were also a repetition of the arguments advanced in the court below except for a slight addition. The addition was in the arguments under grounds 1 and 2 that the decisions in the ***New Plast Industries Limited v Commissioner of Lands and Another***[9] and ***Mutale v Munaile***[3] do not aid the Appellant's case because they relate to the commencement of actions as opposed to the issue before us which is whether or not the High Court has power to dismiss a winding-up Petition before it is heard.

We were urged to dismiss the appeal.

We have considered the ruling appealed against, the record of appeal and arguments by counsel. The six grounds of appeal are intertwined and raise two issues, that is: whether or not the procedure under Order 18 rule 19 of the ***White Book*** is applicable

to winding-up Petitions; and whether or not the inherent jurisdiction of the High Court includes power to hear an application or motion to strike out a winding-up Petition at interlocutory stage and to dismiss it.

In relation to the first issue the Appellant argued that Order 18 rule 19 of the ***White Book*** has no relevance to applications for winding-up because a Petition is not a pleading. Reliance was placed on our decision in the case of ***Mutale v Munaile***[3]. The First and Second Respondents have argued that the Order is applicable by virtue of Order 18 rule 19(3) of the ***White Book***, which extends its application to Petitions and Originating Summons.

Whilst it is correct to say that in interpreting Order 18 rule 19 sub-rule 2 in the ***Mutale v Munaile***[3] case we did state that the term pleading does not include a Petition, it is not correct to say that Order 18 rule 19 is not relevant to winding-up Petitions. As the First and Second Respondents have correctly argued, on a proper interpretation of Order 18 rule 19 sub-rule 3, it is clear that the rule extends the application of Order 18 rule 19 to other forms of

originating process such as originating summons and Petitions. The position taken by the First and Second Respondents is by no means contending that a Petition is a pleading, but merely re-emphasizing the extension of the Order to Petitions. We are of the firm view that there is force in the arguments by the First and Second Respondents because it is the correct interpretation to be given to Order 18 rule 19 sub-rule 3.We also take the view that our decision in the ***Mutale v Munaile***[3] case does not aid the Appellant's case because, as the First and Second Respondents argued, we did not have occasion to pronounce ourselves on the application of Order 18 rule 19 to winding-up Petitions. We accordingly accept and adopt the Respondents' arguments and, therefore, in answer to the first issue raised, the procedure under Order 18 rule 19 is applicable to Petitions by virtue of the provisions of Order 18 rule 19 sub-rule 3. There was, therefore, no misdirection on the part of the Learned High Court Judge in this respect. Consequently grounds 1 and 2 must fail.

We now turn to consider the second issue. It has been argued by the Appellant that although the High Court's jurisdiction is unlimited it is not limitless. Further that, in the exercise of her jurisdiction, the Learned High Court Judge was bound to restrict herself to the provisions of the ***Companies Act and Companies Winding-Up Rules*** which do not provide for dismissal of a Petition at interlocutory stage.

The Respondents have argued that the High Court does have inherent jurisdiction to dismiss a Petition at interlocutory stage.

The parties are agreed that the jurisdiction of the High Court is unlimited but not limitless. They are also not in dispute as regards the contents of sections 9, 10 and 13 of the ***High Court Act***. The point of departure is the interpretation to be given to the sections and whether the jurisdiction of the High Court aforestated, extends to hearing of an application to strike out a winding-up Petition at interlocutory stage and indeed, where appropriate, to dismiss it.

It is important that we discuss the powers that the High Court has in the pursuit of the proper administration of justice before we tackle the issue of jurisdiction because it has a bearing on the decision we have reached.

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 it are stirred to their logical conclusion promptly. In doing so, the High Court has a 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 the appellate courts, a system whereby, an obviously hopeless, frivolous or vexatious 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. In its unlimited jurisdiction, the High

Court is also vested with *"... the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled ..."* (See section 13 of the ***High Court Act***). It is our firm view that the jurisdiction of the High Court as prescribed in the manner the ***High Court Rules*** are couched and by the portion of section 13 we have reproduced in the preceding paragraph is wide enough to include an interlocutory application to strike out a Petition for winding-up, such as the one that confronted the Learned High Court Judge. This can be discerned from the explanation we have given of the effect of the ***High Court Rules*** and the wording of the section which is very wide and all encompassing.

The procedure and practice we have outlined in the preceding paragraph is applicable to all matters before the High Court without exemption. As such there was no misdirection on the part of the Learned High Court Judge when she found that the High Court possesses inherent jurisdiction to entertain an application to

dismiss a Petition at interlocutory stage. The net result of this is that, we do not accept the interpretation ascribed to section 275(2)(j) of the ***Companies Act*** by the Appellant. We agree with the interpretation given to the said section by the Respondents which is that one of the directions that the High Court can give under that section is for the hearing of an application to strike out and, indeed dismiss a Petition at interlocutory stage. To explain the point further, once the High Court invites parties to a hearing, referred to as a scheduling conference, for the giving of directions, if there is an application pending before it, such as to strike out a Petition, it, in the pursuit of achieving the proper administration of justice, is obliged to give directions as to when the application will be heard prior to the substantive hearing. This is the basis upon which the Learned High Court Judge found that the inherent jurisdiction of the High Court includes the power to hear a motion to strike out a Petition. We are fortified in the position we have taken by virtue of the provisions of section 275(1) of the ***Companies Act*** which states as follows:

"On hearing a winding-up Petition, the court may-

(a) Dismiss it with or without costs

(b) Adjourn the hearing conditionally or unconditionally; or

(c) Make any interim order or other order that it thinks fit;"

(The underlining is ours for emphasis only)

Our interpretation of the foregoing section is that it vests the High Court with jurisdiction to entertain an interlocutory application such as the one that the First and Second Respondents laid before the Learned High Court Judge. This interpretation that we have given to the section is similar to the interpretation given to it by the English courts when interpreting section 225(1) of the English ***Companies Act*** 1948 from which we derive our section 275(1). The section states as follows:

"Hearing the Petition

The court may-

(i) Dismiss the petition with or without costs; or

(ii) Order it to stand over; or

(iii) Make any interim order ..."

(The underlining is ours for emphasis only).

When interpreting the said section, in the case of Re a Company, on an interlocutory application by the company, inter alia, to stop the Petitioner from taking further steps in the prosecution of the Petition and to have the Petition struck out as being an abuse of the process of the court, Megarry J, allowed the company's interlocutory application to strike out the Petition. The order by Megarry J was given at interlocutory stage which is prior to the hearing of the Petition. Further, Megarry J struck out the Petition as being an abuse of the process of the court prior to the hearing of the Petition. We are persuaded by this decision.

The foregoing circumstances are similar to the circumstances that confronted the Learned High Court Judge and as such, she was on firm ground when she found that she had inherent jurisdiction to hear the Respondents' motion to strike out the Petition.

We also do not agree with the interpretation the Appellant has given to section 275(2) of the ***Companies Act***. That section, as the First and Second Respondents have quite rightly argued, merely sets out the orders that a High Court may give after hearing a Petition for winding-up. It does not, by any stretch of imagination, mean that at all times a Petition must go to a full hearing and no interlocutory application can be tabled for its striking out before such hearing.

We are also of the firm view that the Appellants have misconstrued the meaning of Rule 51 of the ***Companies Winding-Up Rules***. The said rule sets the standard that an irregularity must attain before a court can invalidate any proceedings in the prosecution of a Petition. It does not, in setting out the said standard, prohibit the tabling of an interlocutory application to strike out a winding-up Petition by the High Court.

In arriving at the decisions we have made in the preceding paragraphs, we have also considered the arguments advanced by Mr. J.P. Sangwa SC, in relation to our decision in the ***New Plast***

and ***Mutale v Munaile*** cases. Whilst it is true that in the said cases we insisted on a party bringing an action to commence it in accordance with the relevant statute, we did not set the parameters of the inherent jurisdiction of the High Court. This is the issue before us now and not the manner of commencement of an action, which was the issue before us in those two cases. We therefore, agree with the First and Second Respondents' argument that the two cases do not aid the Appellant's case.

In answer, therefore, to the second issue, the High Court does have jurisdiction to hear an interlocutory application to strike out or dismiss a Petition. Consequently, there was no misdirection on the part of the Learned High Court Judge on this issue and the fate of grounds, 3, 4, 5 and 6 is that they must fail.

The Appellant's six grounds of appeal having failed, they are accordingly dismissed along with the appeal. The matter is remitted back to the High Court for hearing of the interlocutory application

to strike out Petition. The costs will follow the event and they shall be taxed, in default of agreement.

.....

M. MALILA, SC
SUPREME COURT JUDGE

.....

C. KAJIMANGA
SUPREME COURT JUDGE

.....

N. K. MUTUNA
SUPREME COURT JUDGE