IN THE COURT OF APPEAL FOR ZAMBIA **CAZ/08/040/2016**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

STANBIC BANK ZAMBIA LIMITED **APPELLANT**



AND

SAVENDA MANAGEMENT SERVICES LIMITED **RESPONDENT**

Before the Hon. Mrs. Justice J.Z Mulongoti

In Chambers on 15th day September, 2017

For the Appellant: Ms. Theotis of Mesdames Theotis, Mataka & Sampa Legal Practitioners

For the Respondent: Mr. K. Nchito with Mr. Ndovi of D. Bunting Associates

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RULING

MULONGOTI, JA, *delivered the Judgment of the Court.*

Cases referred to:

1. ***Elise M. Moobola v. Harry M. M Muwezwa (1991) S.J. (S.C.)***
2. ***Bank of Zambia v. Vortex Refrigeration Company Limited SCZ Appeal No. 004/2013***
3. ***African Banking Corporation Zambia Limited v. Plinth Technical Works Limited and Others (2014/HPC/0217)***

Legislation and Works referred to:

1. ***Order XII Rule 1 and Order 1 Court of Appeal Rules S.I No. 65 of 2016***

2. ***Orders 33 Rules 3 and 7 and 62 Rule 8 of the Rules of the Supreme Court 1999 edition***
3. ***Rule 5(2) of S.I No. 6 of 2017 of the Legal Practitioners Costs Order, 2017***
4. ***Halsbury's Laws of England 4th edition***

This is a Ruling pertaining to the Notice of Motion to Raise Preliminary Issues by the appellant (Stanbic Bank (Z) Limited). The Motion was made pursuant to Order XII and Order I of the Court of Appeal Rules (C.A.R) Statutory Instrument No. 65 of 2016 as read with Order 33 Rules 3 and 7 and Order 62 Rule 8 of the Rules of the Supreme Court (1999) edition and Rule 5(2) of the Legal Practitioners (Costs) Order Statutory Instrument (S.I) No. 6 of 2017.

The preliminary issues as follows:

1. Whether the respondent's Notice of Appointment to Tax Bill of Costs may be entertained by this Honourable Court at this stage of the proceedings, as the appeal from which they arise has been heard but is yet to be determined by the Court of Appeal.

   AND that if this Honourable Court determines that it may not entertain the Notice of Appointment to Tax Bill of Costs, then the appellant humbly prays that the same be dismissed with costs.

2. Whether the respondent may proceed to tax the costs of three legal practitioners without certification from the trial Judge that there were sufficient grounds to justify the appearance of more than one legal practitioner as counsel.

   AND that if this Honourable Court determines that the respondent may not tax the costs of three legal practitioners, then

the appellant humbly prays that the Respondent's Notice of Appointment to Tax Bill of Costs be dismissed with costs;

3. Whether the computation to the consolidated bill of costs using the Legal Practitioners (Costs) Order 2017 which took effect on 20th January, 2017 is erroneous and unlawful as the last item for taxation No. 399 is dated 8th December, 2016 which is before the costs order aforesaid came into effect.

AND that if this Honourable Court determines that it is not, then the appellant humbly prays that the Respondent's Notice of Appointment to Tax Bill of Costs be dismissed with costs.

The appellant also filed a List of Authorities and Skeleton Arguments in support of the Notice to Raise Preliminary Issues. The appellant argues that this Court has authority to decide the preliminary issues as to whether the Respondent's Notice of Appointment to Tax Bill of Costs may be entertained by this Court. It is counsel's submission that if this Honourable Court is of the view that the appellant has proved its preliminary issues, the Respondent's Notice to Tax Bill of Costs be dismissed with costs to the appellant.

Counsel contends that Orders XII and I of the CAR and Order 62 Rule 8 of the Rules of the Supreme Court (RSC) provide that taxation of costs properly occurs at the conclusion of proceedings in which they arise, save where there is an Order of the Court granting taxation at an earlier stage.

Additionally, that the costs sought to be taxed by the respondent arise from rulings on an application for leave to lodge appeal. The appellant

was subsequently granted leave to appeal to the Court of Appeal. As such, there is now before the Court of Appeal proceedings of the said appeal. Therefore, any costs ought properly to be taxed at the conclusion of the said appeal. The respondent has not obtained an order of court for the costs to be taxed at this earlier stage.

It is the further submission of counsel that on 21st April, 2017 the respondent filed a Bill of Costs for taxation on party to party basis pursuant to which it is claiming the costs of three learned counsel contrary to Rule 5 (2) of the Legal Practitioners (Costs) Order S.I No. 6 of 2017 which provides:

> **"Where the trial Judge certifies that there were sufficient grounds arising out of the nature of importance, or the difficulty or urgency of the case to justify the appearance of two or more practitioners as counsel, the cost allowed in respect of each practitioner shall be taxed in accordance with the scale costs set out in the schedule."**

It is argued that it is clear that the respondent has not obtained such certification and as such has not revealed the basis or justification for its proceedings to tax the costs of three learned counsel.

Additionally, that the computation of the consolidated bill of costs using the Legal Practitioners (Costs) Order of 2017 which took effect on 20th January, 2017 is irregular as the last item for taxation No. 399 is dated 8th December, 2016. According to counsel, there is a general presumption against the retrospective effect of statutes. Meaning generally, that a newly enacted legislation is not intended to affect matters that occurred before it came into force. Halsbury's Laws of England 4th edition, volume 44 paragraph 922 was cited as authority. It states:

> **"The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of legislature."**

Counsel argued that this position was followed by the Supreme Court in **Elise M. Moobola v. Harry M. M Muwezwa**[1], where the existence of the presumption against retrospection was acknowledged. The Court also stated that the same does not apply to legislation dealing with matters of procedure and its provisions introducing new remedies.

Accordingly, that the Legal Practitioners (Costs) Order 2017 which took effect on 20th January, 2017 is not legislation dealing with matters of procedure nor do its provisions introduce new remedies as such its application to the Respondent's Bill of Costs is irregular.

At the hearing of the Motion, the appellant's counsel relied on the Notice of Motion as well as the List of Authorities.

Mr. K. Nchito who appeared for the respondent submitted viva voce. He argued that the first preliminary issue should fail because the order of costs was final and not pending appeal. That the majority ruling which granted the appellant leave to appeal awarded costs to the respondent and it was a final decision.

Regarding the second preliminary issue, the respondent's counsel contends that there was no Certification of the Bill of Costs because the matter was in the Court of Appeal where there is no provision for certification. The appellant had more than four lawyers at the time. It was therefore necessary for the respondent to have three.

The respondent conceded to the third preliminary issue on the premise that it is in accordance with the law. The recent Supreme Court decision in **Bank of Zambia v. Vortex Refrigeration Company and Dockland Construction Company Limited**[2] was cited as authority. It was stated in that case that:

> ***"S.I No. 6 of 2017 does not have retroactive effect and therefore the applicable S.I for purposes of taxation of the first respondent's bill of costs is S.I No. 9 of 2001 for all works done before S.I No. 6 of 2017 took effect."***

Learned counsel beseeched the Court to grant the respondent leave to amend the Bill of Costs so that it is in conformity with the law as it stands.

In response, Ms. Theotis submitted that the costs the respondent want taxed were granted on an interlocutory ruling and though it cannot be appealed, the substantive matter is yet to be concluded. Therefore, the Notice of Taxation is prematurely before Court.

As for the second issue, counsel acknowledged that a party has a right to have as many lawyers as possible but argued that it is not reasonable to expect the other party to foot the bill for all those lawyers. As for the third issue, counsel submits that the application for leave to amend the Bill of Costs has to be formally made and not by way of submissions as held in the case of **African Banking Corporation Zambia Limited v. Plinth Technical Works Limited and Others**[3] **(2014/HPC/0217)**. The case was cited for persuasion being a High Court decision.

The Court was urged to allow the preliminary issues and to dismiss the respondents Notice of Appointment to Tax the Bill of Costs.

Before I delve into the merits of the Motion to raise preliminary issues raised, I wish to reproduce the Orders of CAR and the RSC upon which the motion is premised.

Order XII Rule 1 of the CAR provides:

> **"The Court may make such order as to the whole or any part of the costs of appeal or in any Court below as may be just, and may assess the same, or direct taxation in accordance with the prescribed scales, or in default of such provision in accordance with the scales provided for the High Court under the High Court Act."**

Order I of the CAR is couched thus:

> **"The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by the Act and these Rules, the Criminal Procedure Code or any written law, or by such rules, orders or directions of the Court as may be made under the Act, the Criminal Procedure Code or any other written law and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and the law and practice in England in the Court of Appeal up to 31st December, 1999..."**

Order 62 Rule 8 of the RSC 1999 Edition states, in part, as cited by counsel for the appellant;

1. **Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.**
2. **If it appears to the Court when making an order for costs that all or any of the costs ought to be taxed at an earlier stage it may, except in a case to which paragraph (3) applies, order accordingly.**
4. **In the case of an appeal the costs of the proceedings giving rise to the appeal, as well as the costs of the appeal, may be dealt with by the court hearing the appeal.**

I have no difficulty accepting the arguments by Ms. Theotis that this Court has jurisdiction to decide the preliminary issues. I note also that the respondent's counsel did not raise issue with this. I also accept that this Court has authority to do so in accordance with the CAR and Order 33 Rules 3 and 7 of the RSC.

I have considered the arguments by both counsel on the merits of the motion to raise preliminary issues.

Having perused the Orders quoted above especially Order 62 Rule 8 of the RSC, I am of the considered view that the first preliminary issue has merit. It is clear that the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise. Order 62 rule 8 (2) allows for early taxation if the Court orders for it. The Ruling of the Court of Appeal, which awarded costs to the respondent simply stated *"the costs hereof are awarded to the respondent in any event"*. It did not state that the costs are to be paid forthwith, or to be taxed early.

Accordingly, the first preliminary issue succeeds.

Regarding the second issue, the appellant's counsel contends that Rule 5 (2) of the Legal Practitioners (Costs) Order S.I No. 6 of 2017 provides that the trial Judge should certify that the nature of the importance of the case justifies the appearance of two or more practitioners. The respondent did not obtain such certification as such the appellant cannot pay for the three lawyers. The respondent's counsel argues that the matter was in the Court of Appeal and its Rules do not provide for

certification. Further that the appellant had four lawyers so the respondent also instructed three.

My reading of this Rule is that certification refers to scale of costs in proceeding in the High Court. Therefore Rule 5(2) of the S.I on certification clearly applies to scale of costs to proceedings in the High Court and not in the Court of Appeal.

I note that the S.I of 2017 cannot apply retrospectively to the proceedings in casu, which happened in 2016. So for all intent and purposes the taxation of the costs subject of the current application are to be governed by the 2001 Legal Practitioners (Costs) Order which was in force then. The 2001 Legal Practitioners (Costs) Order also had the same Rule 5(2) with the same wording as the one in S.I No. 6 of 2017 though it is not applicable in this case as aforestated.

I fail to see the relevance of Order XII Rule 1 of the CAR to the Motion. I do not think Rule 5 (2) of the Legal Practitioners (Costs) Order can be extended to the Court of Appeal through this Order. The Order (XII Rule 1) is generally about prescribed scales provided for the High Court being applicable or resorted to where the Court of Appeal has no provision for such.

In light of the foregoing the second preliminary issue therefore fails.

Regarding the third preliminary issue which the respondent has conceded to, I find that Ms. Theotis' arguments in this regard are on point. The S.I of 2017 cannot apply to these proceedings as stated above. The respondent would be required to file a formal application

to amend and not do so through counsel's viva voce submissions as submitted by Ms. Theotis.

In the net result the first and third preliminary issues having succeeded, the Notice of Appointment to Tax Bill of Costs filed by the respondent, is dismissed with costs to be taxed failing agreement.

Delivered at Lusaka this 15th day of Sept, 2017.

J.Z. MULONGOTI
COURT OF APPEAL JUDGE