

**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

APPEAL No. 79/2017



BETWEEN

CITIBANK ZAMBIA LIMITED

APPELLANT

AND

SUHAYL DUDHIA

RESPONDENT

Coram: Mchenga DJP, Mulongoti and Sichinga JJA

On the 4th October, 2017 and 14th December, 2017

For the Appellant: Mr. R. Peterson of Chibesakunda and Co

For the Respondent: N/A

JUDGMENT

MULONGOTI, JA, delivered the judgment of the court.

Cases referred to:

- 1. *N.B Mbazima and Others Joint Liquidators of Zimco Limited (In Liquidation) v Reuben Vera (2001) ZR 43 (SC)***
- 2. *Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1995 – 97) ZR 187 (SC)***

3. **Michelo Special Georges Mwiinga and Florence Kachesa Mwiinga v Zambia National Commercial Bank Plc. SCZ Judgment No. 51/2014**
4. **National Westminster Bank Plc. V Skelton and another (1993) 1 ALL E.R 242**
5. **Ashley Guarantee Plc. v Zacharia and another (1993) 1 ALL E.R 254**
6. **Citibank Trust v Ayivor and another (1987) 3 ALL E.R**

Legislation referred to:

1. **Constitution of Zambia (Amendment) Act No.2 of 2016**
2. **High Court Act, Chapter 27 of The Laws of Zambia**

This is an appeal against the ruling of the High Court which stayed the appellant's case before that Court pending determination of the case between the same parties in the Industrial Relations Court (IRC) division.

The brief background to this case is that the respondent was employed by the appellant from 10th December, 2010 until 4th July, 2013 when his contract of employment was terminated. During the tenure of his employment, the respondent obtained a personal loan from the appellant in the sum of K121,004.82. One of the terms of the loan agreement was that upon termination of the respondent's employment the loan would become due and payable. The appellant immediately following termination, informed the respondent that the loan was due and payable.

However, he failed to pay prompting the appellant to institute legal proceedings against him sometime in November 2015, claiming the balance of the loan at K156,560.35 with interest.

Meanwhile, the respondent had earlier, on the 23rd of July, 2013 sued the appellant in the Industrial Relations Court for *inter alia* damages for unfair, wrongful and unlawful termination of employment.

The respondent filed a conditional memorandum to the appellant's case in the High Court. Then he made an application before the deputy registrar to strike out the case for abuse of court process. The deputy registrar dismissed the application on the bases that even though the parties are the same and the issues of the loan arose while the defendant (respondent) was an employee of the plaintiff (appellant), the subject matters of the two cases are independent of each other and capable of being heard separately.

The deputy registrar reasoned that he did not envisage the two courts making conflicting decisions even in regard to the award of interest on the loan. He opined that moreover the defendant would not be prejudiced if the matter relating to a personal loan

was determined separately especially that the same had independent and clear agreed terms and conditions of repayment with ascertained rate of interest which are different from the defendant's case in the IRC.

This prompted an appeal before the High Court by the defendant. The appeal was primarily on the ground that the deputy registrar erred when he held that there was no likelihood of having conflicting judgments in the matter before the IRC and the one before the High Court.

After considering the affidavit evidence by both parties which exhibited the Notice of Complaint filed in the IRC, the Judge found that the issue of the respondent's loan which was the core of the appellant's claim in the High Court, is raised in the Notice of Complaint before the IRC and there is likelihood that it would be addressed. In addition that the fact that the respondent obtained the loan while in the employ of the appellant made the issue of the loan dependent on his case in the IRC. The Judge then stayed the proceedings in the High Court pending the outcome of the respondent's case in the IRC, prompting this appeal before us.

The appellant raised two grounds of appeal as follows:

- 1. The High Court Judge erred in law and fact when she held that the loan agreement is dependent on the Notice of Complaint in the industrial relations division, contrary to established jurisprudence governing loan agreements and indeed the jurisdiction of the industrial relations division of the High Court.**
- 2. The learned High Court Judge erred in law and fact when she stayed the proceedings in the High Court and refused or neglected to hold that the proceedings in the industrial relations division were separate and or distinct and the two proceedings could proceed at the same time.**

Mr. Peterson, who appeared for the appellant, also filed heads of argument in which he argued the two grounds as one. He submitted that the two matters in question are separate and distinct and do not amount to multiplicity of actions. Learned counsel contends that the Judge in the court below fell into error when she held that the issue of the respondent's loan, was raised in the Notice of Complaint in the IRC division and there was a likelihood that that division would address the issue.

Our attention was drawn to the respondent's claims before the IRC division at pages 15 and 16 of the record of appeal. Counsel pointed out that there is no claim relating to the loan. The respondent only disclosed the fact that he obtained a loan from the appellant during the course of his employment. Learned Counsel argued that the respondent does not even deny that the loan was due and payable upon termination. Therefore, it is inconceivable that the IRC division would address the issue. Learned counsel concluded that there is thus no danger of conflicting judgments as reasoned by the court below.

Additionally, that the issue of the loan is outside the jurisdiction of the IRC and is purely a commercial dispute. This is why the appellant never filed a counter claim as correctly found by the deputy registrar at page 75 of the record of appeal.

It was the further submission of counsel that the mere fact that the loan was obtained during the respondent's employment does not make it dependent on his case in the industrial relations division. The case of **N.B Mbazima and others Joint Liquidators of Zimco Limited (In Liquidation) v Reuben Vera**¹ was cited as authority that the IRC, as it then was, before the Constitution amendment, had no jurisdiction in conveyancing matters, even though the issues in that matter arose out of the employment

relationship between the parties. In the present case the dispute in the IRC division is the alleged wrongful termination while in the High Court it is over repayment of moneys obtained through a loan. The two subject matters are therefore different.

Learned counsel relied on the Supreme Court decision in **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited**² to the effect that a multiplicity of actions occurs when the same parties litigate the same subject matter before different courts. Counsel concluded that the lower court erred in focusing on the employment relationship that existed between the parties without assessing the nature of the claim before it and that it was separate and distinct from the IRC division case.

It was equally submitted that there is no prejudice to be suffered by the respondent should the matters proceed separately while the appellant would; should the loan amount remain outstanding pending the IRC case as the issue of the loan cannot be addressed by that court. We were accordingly urged to allow the appeal.

For its part, the respondent also filed its heads of argument. It is argued that according to Article 133 (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016, the Industrial Relations Court was made a division of the High Court which has jurisdiction to determine all matters in controversy between the parties as provided in section 13 of the High Court Act. Reference was made to the respondent's affidavit in support of summons to dismiss the appellant's action for abuse of court process, which exhibited a document marked 'SD1' which read in part that:

"By other letters dated the said 4th July, 2013, the respondent purported to compute my dues and liabilities to the Bank, called in my personal loan for immediate payment and demanded that I return all Bank property in my custody including the Bank car without taking into account the various company policies regarding the loan, payment of amounts due to me under my pension scheme and my right to purchase the Bank car at book value upon termination..."

It is contended, that the above excerpt from the respondent's Complaint before the IRC, is a clear indication that the issue regarding the payment of the loan is in fact a matter of controversy between the parties. By virtue of section 13 of the High Court Act, the IRC division has got jurisdiction to determine the issue. Furthermore, that the loan, arising out of employment, the termination of which the respondent has challenged, has a

bearing on the terms of repayment i.e whether the appellant will be entitled to levy the new interest at 15% following termination. Therefore, if the IRC holds in favour of the respondent, it would, inevitably have to pronounce itself on whether it would be just for the appellant to benefit from their wrongful and unlawful termination of the respondent's employment by charging a higher interest rate on the loan.

In addition that it would also have to pronounce itself on the period on which the appellant can validly collect interest on the loan taking into account the litigation between the parties. It is submitted that to place these issues before another court is a clear case of multiplicity of actions and likely to result in conflicting judgments. The case of **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited**² was relied upon.

It is further argued that the court below was on firm ground when it stayed the proceedings, alternatively to dismissing the action in accordance with Order 19 rule 19 (1) of the Rules of the Supreme Court, 1999 edition. The appellant, it is submitted, is not prejudiced in anyway by the stay of proceedings.

At the hearing of the appeal, only the appellant's counsel, Mr. Peterson was present. He relied on his heads of argument. He submitted that the respondent's argument that the IRC judgment may pronounce itself on the rate of interest to be applied to the loan is flawed. According to counsel whatever its decision, the IRC judgment cannot affect when the loan becomes collectable and the interest rate applied to any amount outstanding on the loan.

We have considered the arguments and submissions by counsel. We will consider the two grounds of appeal simultaneously. The critical issue this appeal raises is whether the appellant's case for repayment of the loan which is pending in the High Court is dependent on the respondent's case in the IRC as held by the Court below.

We perused the respondent's Notice of Complaint in the IRC which is at pages 32 to 42 of the record of appeal. Apart from the claim for damages for unfair, wrongful and unlawful termination of the contract of employment, the other claims are for a declaration that he is entitled to be offered to purchase the motor vehicle, a Jeep, registration number ALB 312 at its current book value in accordance with the appellant's car policy. The respondent also claims aggravated damages and an order for

payment of dues under the complainant's pension plan and any other relief the Court deems fit. As argued by Mr. Peterson there is no claim for relief pertaining to the personal loan, the subject of the proceedings in the High Court.

We are therefore inclined to overturn the High Court decision that the appellant's case is dependent on the Notice of Complaint in the IRC. By the respondent simply mentioning that he had a loan with his former employer does not make the issue of the loan a dispute to be determined in the IRC.

In the case of **Michelo Special Georges Mwiinga and Florence Kachesa Mwiinga v Zambia National Commercial Bank Plc**³, the Supreme Court cited with approval, the English case of **National Westminster Bank Plc v Skelton and another**⁴ which held that a mortgagee's right to possession of the mortgaged property cannot be defeated by a cross claim, even if the cross claim exceeded the amount of the mortgage debt. The Supreme Court also noted that in the latter case of **Ashley Guarantee Plc v Zacharia and another**⁵ the general rule that subject to contractual or statutory limitations, a mortgagor could not defeat a legal mortgagee's right to possession by claiming an equitable set off for an un-liquidated sum, even if it exceeded the amount of the mortgage arrears; was acknowledged.

Furthermore, the Supreme Court observed that the 1st appellant's claim against the respondent for benefits does not defeat the respondent's right to possession. The court reached this conclusion after it considered the case of **Citibank Trust v Ayivor and another**⁶ in which Mervyn Davies J stated that the existence of a counter claim will not defeat the legal mortgagee's right to possession where he establishes his indebtedness.

We opine that the principles in these cases, though dealing with mortgage debt, apply in this case of a personal loan agreement. Guided by these cases, we agree with counsel for the appellant that the loan agreement is distinct and separate from the employment contract. The issue of conflicting judgments does not therefore, arise. The loan being a separate agreement cannot be defeated by and be dependent on the respondent's case in the IRC.

We note that the respondent does not dispute that he obtained the loan in question while in the employ of the appellant. The said loan was not repaid in full. He also does not dispute that the loan agreement provided that immediately upon his termination, the loan became due and payable. The respondent's indebtedness to the appellant is therefore, *prima facie* established. The appellant cannot be stopped from pursuing

payment of the loan merely because the respondent acknowledged and mentioned the issue of the loan in passing in the action in the IRC.

The respondent's argument that the IRC will have to pronounce itself on whether the appellant will be entitled to levy the new interest at 15% following termination is fundamentally flawed. As earlier stated the issue of the loan does not arise in any way in the IRC. If the respondent succeeds in the IRC he will, at best, be awarded damages for unfair or wrongful termination which will not affect the loan. The issue of the loan especially the interest rate does not arise in any way in the IRC.

The loan, in terms of the agreement, at risk of pre-empting the High Court decision, became due after termination, regardless of who terminated it and whether it is fair or unfair termination is immaterial.

We are also of the considered view that the issue of the interest rate will largely be determined by the High Court following trial of the matter. Suffice for us to state that this would be based on the evidence including the terms of the said loan agreement.

We find the respondent's argument that the IRC having been made a division of the High Court following the 2016 amendment of the Constitution, has jurisdiction to determine all matters in controversy, to be devoid of merit and certainly misapplied in this case. The import of section 13 is that the Court must determine all matters in controversy between the parties. This, to us, entails not leaving the dispute unresolved or failing to pronounce itself on issues arising in the matter.

This cannot by any stretch of an argument mean that the IRC being a division of the High Court, now has jurisdiction to hear and determine all matters, as the High Court general list does.

Article 133 (2) of Constitution as amended, is clear that the divisions created thereby are specialized meaning that they are confined to dealing with disputes pertaining to those divisions. Thus, the Commercial Court division will obviously deal with commercial matters likewise the Industrial Relations Court division industrial and labour matters.

Matters of conveyancing cannot be adjudicated upon in the IRC division as held in the case of **N.B Mbazima and others Joint**

Liquidators of Zimco Limited (In Liquidation) v Reuben Vera¹
which is still good law.

Be that as it may, it is noteworthy that the matter in the IRC actually commenced in 2013 way before the amendments and so should be determined accordingly.

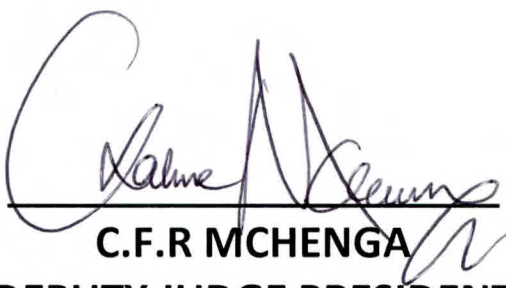
In light of all the foregoing we find that the appeal has merit.

The danger of conflicting judgments and multiplicity of actions does not arise as the two actions are separate and distinct.

We thus set aside the Ruling of the High Court that stayed the proceedings.

We remit the case back to the High Court for trial, before the same Judge. Costs in this court and below, to the appellant to be taxed failing agreement.


Delivered at Lusaka the 14th day of December, 2017



C.F.R MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



J. Z. MULONGOTI
COURT OF APPEAL JUDGE



D. L. Y. SICHINGA, SC
COURT OF APPEAL JUDGE