

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

APPEAL NO.106/2017

BETWEEN:

ZAMBEZI PORTLAND CEMENT LIMITED  
FINSBURY INVESTMENTS LIMITED



1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLENT

AND

MILOTO TRANSPORT LIMITED  
ROAD TRANSPORT AND SAFETY AGENCY

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT

Coram: Mchenga DJP, Mulongoti and Sichinga SC, JJA

On 14<sup>th</sup> November 2017 and 9<sup>th</sup> May 2018

For the 1<sup>st</sup> and 2<sup>nd</sup> Appellants: Mr. J. Sangwa SC, Simeza Sangwa and  
Associates

For the 1<sup>st</sup> Respondent: Mr. C. Sianondo, Malambo and Company

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## J U D G M E N T

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**Mchenga, DJP** delivered the judgment of the Court.

Cases referred to:

1. Kufalika v Kalunga SCZ/9/070/2013, Appeal No. 73 of 2013
2. Sheikh Abdul Kayum and Others v Alibhai and Others [1963] AIR 309
3. Krishna Priya Ganguly v University of Lucknow [1984] AIR 309
4. Naranjan Singh v Punjab and Haryana High Court through its Registrar  
and Another CWP. No. 14849 of 2009.



5. **Finsbury Investment Limited v Antonio Ventriglia, Manuela Ventriglia and Ital Terazo Limited (In Receivership) SCZ No. 42 of 2016**
6. **Finsbury Investments Limited v Ital Terrazo Limited Z (In Receivership), Antonio Ventriglia and Manuela Ventriglia SCZ judgment No. 10 of 2017**
7. **Indeni Petroleum Refinery Company Limited v Kifco oil limited, Andre Bunsoni, Silas Mumba and Emmanuel Shikapito SJZ 27 of 2017**

Legislation referred to:

1. **The Companies Act, Chapter 388 of the Laws of Zambia**
2. **Road Traffic Act, Act No. 11 of 2002**
3. **The High Court Act, Chapter 27 of the Laws of Zambia**

Works referred to:

1. **The Rules of the Supreme Court, 1999 Edition**
2. **In Halsbury's Laws of England, Fourth Edition Reissue, Vol. 37, Butterworths LexisNexis, 2001**

This is an appeal against part of the ruling of the High Court dated 31<sup>st</sup> October 2016, which held that cause No. 2016/HP/599 be stayed pending the determination of cause No. 2008/HPC/366

The background of this matter is that on 1<sup>st</sup> July 2015, Valerio Ventriglia, who appeared to be acting on behalf of the 1<sup>st</sup> appellant, entered into an agreement with the 1<sup>st</sup> respondent. In that agreement, the 1<sup>st</sup> appellant sold their fleet of trucks and trailers to the 1<sup>st</sup> respondent. Following the sale, the 2<sup>nd</sup> respondent changed the particulars of the owners on the motor vehicle



registration certificates for the said trucks and trailers, from the 1<sup>st</sup> appellant to the 1<sup>st</sup> respondent.

The authority of Valerio Ventriglia to enter into the agreement on behalf of the 1<sup>st</sup> appellant was subsequently questioned and the 1<sup>st</sup> appellant approached the 2<sup>nd</sup> respondent, demanding that the changes in the particulars of the ownership of the trucks and trailers be reversed. This was on the ground that Valerio Ventriglia did not have the authority to enter into the transaction on behalf of the 1<sup>st</sup> appellant.

The 2<sup>nd</sup> respondent's response was that they could only reverse the changes if they were served with a court order to that effect. The 1<sup>st</sup> and 2<sup>nd</sup> appellants then took out originating summons (2016/HP/599) against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, seeking the following reliefs:

- a. **A declaratory order pursuant to the provisions of Section 277 of the Companies Act, that the transfer or sale of the 1<sup>st</sup> appellant's trucks to the 1<sup>st</sup> respondent on the basis of the agreement between the 1<sup>st</sup> appellant and 1<sup>st</sup> respondent was null and void; and**
- b. **An order directing the 2<sup>nd</sup> respondent to issue new motor vehicle registration certificates in relation to the said trucks and trailers in the name of the 1<sup>st</sup> appellant.**

Before the matter could be heard, the 1<sup>st</sup> respondent applied to set aside the originating summons. The application was premised on **Order 2 Rule 1, Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court** and it was on the grounds that:

1. **The originating process was irregularly and incompetently before the High Court as the appellants' challenge of the 2<sup>nd</sup> Respondent's decision could only be determined by the Road Service Tribunal;**



2. The originating process is incompetently before the High Court as it was issued without the resolution of the 1<sup>st</sup> appellant and there was an injunction delivered by the High Court restraining the 2<sup>nd</sup> appellant and its agents from acting or purporting to act as shareholder in 1<sup>st</sup> appellant, convening any meeting of the 1<sup>st</sup> appellant or taking out any cause of action as shareholder of the 1<sup>st</sup> appellant;
3. Messrs Simeza Sangwa and Associates did not have instructions to represent the 1<sup>st</sup> appellant in the matter; and
4. Messrs Simeza Sangwa and Associates by acting for the 2<sup>nd</sup> appellant and at the same time taking out proceedings adverse to the 1<sup>st</sup> appellant at the instance of 2<sup>nd</sup> respondent were conflicted as advocates.

During the hearing of the application to set aside the originating summons, evidence was led showing that in cause No. 2008/HPC/366, the 2<sup>nd</sup> appellant was the plaintiff, while Antonino Ventriglia and Manuela Ventriglia, were 1<sup>st</sup> and 2<sup>nd</sup> Defendant, respectively. In the writ filed in that case, the 2<sup>nd</sup> appellant was seeking the following reliefs:

1. An order that the 2<sup>nd</sup> appellant was the registered and beneficial owner of 580,000,000 issued shares in Zambezi Portland Cement Limited.
2. A declaration that Antonino Ventriglia and Manuela Ventriglia were not registered owners of any shares in Zambezi Portland Cement.
3. An injunction restraining Antonino Ventriglia and Manuela Ventriglia or their agents from holding themselves out as shareholders of Zambezi Portland Cement Limited or taking any course of action as shareholders of Zambezi Portland Limited

In the same case, Antonino Ventriglia and Manuela Ventriglia filed a counter claim and were seeking reliefs including:

1. A declaration that they are the only shareholders of Zambezi Portland Cement Limited;
2. A declaration that they had lawfully rescinded the agreement to transfer 50% of the shareholding in the company to the 2<sup>nd</sup> appellant for reasons of fraud and alternatively, an order for the rescission of agreement;



3. An order that changes made at the Companies Registry reflecting the 2<sup>nd</sup> appellant and Ital Terrazo Limited as shareholders for the 1<sup>st</sup> appellant be expunged from the Companies Register;
4. In the alternative, payment of the sum of K500,000,000 and US\$ 60,0000,000 being the value of the shares agreed to be transferred to the 2<sup>nd</sup> appellant;

The evidence also showed that on 19<sup>th</sup> May 2014, the 2<sup>nd</sup> appellant discontinued their case against Antonino Ventriglia and Manuela Ventriglia, but Antonino Ventriglia and Manuela Ventriglia, maintained their counter claim.

Evidence was also led of a case in which the shareholding in the 1<sup>st</sup> appellant was being contested, cause 2015/HN/089.

After considering the evidence before her, the trial judge found that the matter (2016/HP/599), was competently before her because it was not concerned with an issue that required one to appeal to the Road Transport Appeals Tribunal under **Section 112 of the Road Traffic Act**. On the question whether Messrs Simeza Sangwa had authority to commence the action on behalf of the 1<sup>st</sup> appellant and whether they were conflicted, her position was that she could not make a determination because the same issue was up for determination in a case that was before the Supreme Court.

The trial Judge also found that although the case (2016/HP/599), arose out of the disputed sale of trucks and trailers, it was connected to the winding up proceedings in cause 2015/HPC/225 and the shareholding case in cause 2015/HN/089. All these cases revolve around the shareholding in the 1<sup>st</sup> appellant as well as who has authority to act as their agent. She found that it would be



inappropriate to proceed with cause 2016/HP/599 until the shareholding was resolved. Instead of dismissing the case as prayed, she stayed the proceedings. She also invited the parties to consider consolidating this case with cause 2015/HPC/225, the winding up proceedings.

The sole ground of appeal advanced by the appellants is that there was misdirection when the trial judge held that the prosecution of cause No. 2016/HP/559 be stayed pending the hearing and determination of cause No. 2008/HPC/366.

At the hearing Mr. Sangwa SC, who appeared for the appellants, relied on the written submissions filed in on 17<sup>th</sup> September 2017, which he complimented with oral submissions. The gist of his submission is that the court below misdirected itself when it stayed the proceedings, a relief that none of the parties before it sought. He argued that since the relief the 1<sup>st</sup> respondent was seeking was the setting aside of the proceedings, the court was limited to determining that issue. The court should not have considered staying the proceedings because the issue was not raised by the mover of the application. He referred to the cases of **Kutalika v Kalunga**<sup>1</sup>, **Sheikh Abdul Kayum and Others v Alibhai and Others**<sup>2</sup>, **Krishna Priya Ganguly v University of Lucknow**<sup>3</sup> and **Naranjan Singh v Punjab and Haryana High Court through its Registrar and Another**<sup>4</sup> in support of his arguments.

Mr. Sangwa SC also submitted that in arriving at the aforementioned decision, the trial judge considered matters that were not properly before the court. He submitted that the assertion that the shareholding in the 1<sup>st</sup> appellant had not



been decided in cause No. 2008/HPC/366 was a misdirection because the shareholding was known. He also submitted that reference should not have been made to the winding up case in Cause No. 2015/HPC/255, because the matter before the court was premised on **Section 277 of the Companies Act**, that deals with disposition of company property. All that the court was required to do was to rule on the legality of the transfer.

As he concluded, Mr. Sangwa SC argued that the Supreme Court decisions the respondents have referred to in their submissions are not binding on this Court because they were delivered before the 2016 amendment of the Constitution. In his words, they were effectively the judgments of this Court because it has taken the position that was formerly held by that court. He ended by urging us to uphold the appeal and order that the trial judge deals with the issues that were raised before her.

In response, Mr. Sianondo relied on the submissions he filed on 2<sup>nd</sup> October 2017, which he complimented with oral submissions. He submitted that the trial judge was on firm ground when she ordered that the proceedings in cause No. 2016/HP/599, be stayed pending the determination of the matters in Cause No. 2008/HPC/366. He argued that this was in keeping with proper case management and he referred to **Finsbury Investment Limited v Antonio Ventriglia, Manuela Ventriglia and Ital Terazo Limited (In Receivership)**<sup>5</sup> and **Finsbury Investments Limited v Ital Terrazo Limited Z (In Receivership), Antonio Ventriglia and Manuela Ventriglia**<sup>6</sup>, in support of the proposition.



Mr. Sianondo argued that scrutiny of the pleadings in cause No. 2008/HPC/366 shows that there is a raging contest as to the shareholding in the 1<sup>st</sup> appellant. The shareholding in that case, is intertwined with the transaction which is the subject of cause No. 2016/HP/599 because if it is determined that the 2<sup>nd</sup> appellant is not a shareholder in the 1<sup>st</sup> appellant, then their claim in cause 2016/HP/599 will fail.

In response to the submission that by staying the proceedings, the court had made a determination on an issue that was not raised by the parties, Mr. Sianondo referred to the case of **Indeni Petroleum Refinery Company Limited v Kifco Oil limited, Andre Bunsoni, Silas Mumba and Emmanuel Shikapito**<sup>7</sup> and submitted that the decision was in keeping with proper case management. He also submitted that it was within the discretion of the trial Judge to raise the issue and deal with it on her own motion.

Mr. Sianondo concluded by submitting that we are bound by the decisions of the Supreme Court that he referred to in his submissions because they were determined after the amendment of the Constitution. He urged us to dismiss the appeal with costs because it has no merit.

We have considered the evidence on record and the submissions by counsel. The first issue we will deal with is the submission by Mr. Sangwa that Supreme Court judgments passed before the 2016 Constitutional amendments are not binding to this Court and are only of a persuasive nature.



Our understanding is that the 2016 amendments to the Constitution created the Court of Appeal as an intermediate court between the High Court and the Supreme Court. The amendments did not substitute the Supreme Court with the Court of Appeal. The Supreme Court has remained the final court of appeal just as it was before the amendment. Since the Supreme Court is the final court, just as it was before the amendment, all its decisions, without distinction, are binding on us. This being the case, we are not persuaded by Mr. Sangwa's proposition that the Supreme Court's pre-2016 decisions are not binding on us. In any case, as canvassed by Mr. Sianondo, the Supreme Court's decisions on which he relies are post the 2016 Constitutional amendment, which is not helpful to Mr. Sangwa's argument.

Mr. Sangwa SC, also submitted that the trial judge took into consideration extraneous matters in arriving at the decision to stay the proceedings. He made particular reference to the shareholding in the 1<sup>st</sup> appellant. While we agree with Mr. Sangwa that the case before the trial judge was premised on **Section 277 of the Companies Act**, there was evidence before her indicating that there was litigation concerning the shareholding in the 1<sup>st</sup> appellant. While the 1<sup>st</sup> appellant was claiming that the sale of the trucks and trailers was incompetent because Valerio Ventriglia had no authority to enter into the agreement, the 1<sup>st</sup> respondent's position was that he had the authority because he was appointed by the 1<sup>st</sup> appellant's shareholders.



Further, the 2<sup>nd</sup> appellant's position is that the persons who appointed Valerio Ventriglia are in fact not shareholders. Given that Valerio Ventriglia's decision to enter into the contract of the sale of the trucks is dependent on whether he was appointed by the right shareholders, it cannot be said that the shareholding of the 1<sup>st</sup> appellant was an extraneous issue. This being the case, we find that the trial judge was on firm ground when she took cause No. 2008/HPC/366 into consideration. We do not see how the legitimacy of Valerio Ventriglia's actions in the case before her can be resolved when the shareholding in the 1<sup>st</sup> appellant is being contested. The legitimacy of his actions is dependent on his being appointed by the right shareholders.

Coming to Mr. Sangwa's argument that since the application before the court was one to dismiss the action, there was no basis for the trial judge granting an order staying proceedings. The cases of **Kutalika v Kalunga<sup>1</sup>**, **Sheikh Abdul Kayum and Others v Alibhai and Others<sup>2</sup>**, **Krishna Priya Ganguly v University of Lucknow<sup>3</sup>** and **Naranjan Singh v Punjab and Haryana High Court through its Registrar and Another<sup>4</sup>**, which Mr. Sangwa SC referred to, can be distinguished from the circumstances of this case. In all those cases, the court granted either an injunction or a writ of mandamus, reliefs which a court cannot grant in the exercise of its own discretion. The court can only grant the reliefs if it is moved and the parties are heard.

It is trite, that the High Court Rules empower that court to make interlocutory orders, which it considers necessary in the interests of justice, whether expressly



asked for by the parties or not. To this end **Order 3 rule 2 of the High Court Rules of the High Court Act**, provides as follows:

Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.

In this case, the court only stayed the proceedings and in **Halsbury's Laws of England**, Vol. paragraph 926, at page 290, states as follows on the staying proceedings in civil cases:

"... The object of the order is to avoid the trial or hearing of the claim taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned on the opposite party or to prevent the abuse of process. The order is made generally in the exercise of the courts discretionary jurisdiction, and by way of summary process, that is without trial on the substantive merits of the case, and, at any rate in the exercise of its inherent jurisdiction, ...."

Further, in paragraph 930, at page 293, of the same publication, the following is said on the same subject:

"The court's general jurisdiction to stay proceedings in proper cases is not limited by the Civil Procedure Rules, and indeed is distinct from the jurisdiction conferred by the rules, since the two sources of the court's power continue to exist side by side and may be invoked cumulatively or alternatively...."

Even if there was no application before the trial judge for stay of the proceedings before her, having received evidence indicating that the resolution of the issues before her was contingent on the outcome of cases that were before other courts, we are satisfied that it was within her discretion to stay the proceedings.




Further, having rightly found that the shareholding in the 1<sup>st</sup> appellant was crucial to the determination of the 1<sup>st</sup> appellant's claim, we are satisfied that she judiciously exercised her inherent discretion to stay the proceedings.

Consequently, we find no merit in this appeal and we dismiss it with costs to the 1<sup>st</sup> respondent.

  
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**C.F.R. Mchenga**  
**DEPUTY JUDGE PRESIDENT**

  
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**J. Z. Mulongoti**  
**COURT OF APPEAL JUDGE**

  
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**D.L.Y. Sichinga SC**  
**COURT OF APPEAL JUDGE**