

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

**CAZ Appeal No. 168/2020
CAZ/08/099/2020**

28 DEC 2021

BETWEEN:

**COORPORATIVA MURATORI & CEMENTISTI
-CMC DI RAVENNA**

APPELLANT

AND

**LUFUBU POWER COMPANY LIMITED
NICO INSURANCE ZAMBIA LIMITED**

1ST RESPONDENT

2ND RESPONDENT

CORAM : Chishimba, Ngulube and Siavwapa JJAs

On the 23rd September, 2021 and 28th December, 2021

For the Appellant : Mr. J. Chimakanta & Mr. M. Nkunica of
Simeza Sangwa & Associates

For the 1st Respondent: Mr. R. Peterson & L. Chilekwa of Messrs
Chibesakunda & Co.

For the 2nd Respondent: Mr. K. Kamfwa of Wilson & Cornhill

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASES REFERRED TO:

- 1) Nkhata & Four Others v The Attorney General (1966) ZR 124
- 2) Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172
- 3) Indeni Petroleum Refinery Company Limited v Kafco Oil Limited & Others
Selected Judgment No. 29 of 2017.
- 4) Mulenga v Mumbi Ex-parte Mhango (1975) ZR78

- 5) Richard Mofya v Staylon Employment and Investments Limited & Ecobank Limited SCZ Judgment No. 37 of 2014/Appeal No. 011/2013
- 6) Murray and Roberts Construction Limited & Kaddoura Construction Limited v Lusaka Premier Health Limited and Industrial Development Corporation of South Africa SCZ Appeal No. 141/2016
- 7) Savenda Management Services v Stanbic Bank Zambia Limited SCZ No 10/2018
- 8) Salomon v Salomon & Company Limited (1897) AC 22
- 9) Associated Chemicals Limited v Hill Delamain Zambia Limited & Ellis and Company (1998) ZR 9
- 10) S.P. Mulenga Investment Limited v Weluzani Zulu CAZ Appeal No. 58/2018
- 11) Shamwana and others v The People SCZ No. 12 of 1985 (S.C)
- 12) Justin Mwangwe v Examinations Council of Zambia SCZ Appeal No. 212/2015
- 13) Kristamma Naidu v Chapa Naidu (1930) ZR 61 (S.C)
- 14) Examinations Council of Zambai v Relilance Technology Limited Appeal No. 46 of 2014
- 15) H B Gandhi, Excise and Taxtion Officer- cum Assessing Authority 1992 Supp (2) SCC 318
- 16) Kuldeep Sigh v Commissioner of Police (1990) 2 SCC 10
- 17) Hamid v Khalid & Co-operative Insurance Society General Insurance Limited (2017) EWCA CIV 201
- 18) John Mugala & Kenneth Kabenga v The Attorney-General (1988 - 1989) Z.R. 171

LEGISLATION CITED:

- 1) The High Court Rules Chapter 27 of the Laws of Zambia
- 2) The Companies Act No. 10 of 2017

1.0 INTRODUCTION

1.1 This is an interlocutory appeal against the order dated 13th March, 2020 made by Mrs. Justice K. E. Mwenda-Zimba at a scheduled status conference. After taking judicial notice of the

proceedings in the winding-up petition under Cause No. 2019/HPC/0280 before Judge E. L. Musona and reading the judgment therein, the learned Judge held that the appellant herein, who was the plaintiff in the court below, is the same entity as the respondent in the petition to wind-up under Cause No. 2019/HPC/028. Therefore the appellant could only appear through the Liquidator.

2.0 **BACKGROUND**

2.1 The 1st respondent who intended to develop three hydropower plants to be constructed on the Lufubu River in the Districts of Mpulungu and Nsama invited interested companies to tender for all the civil works. The appellant, a company incorporated in the Republic of Italy and incorporated in Zambia as a foreign company was shortlisted. Thereafter, the appellant was notified that its tender had been successful. The 2nd respondent on behalf of the appellant, issued a tender bond in the sum of US\$3, 000, 000.00 in favour of the 1st respondent in line with clause 3 of the Tender Bond.

2.2 By letter dated 4th April, 2019, the 1st respondent purported to disqualify the appellant from the tender process pursuant to

clause 1.4.7 of the Tender Instructions. By a subsequent letter dated 8th April, 2019, the 1st respondent demanded the immediate payment of the tender bond sum from the 2nd respondent on the basis that the appellant had failed to meet its obligations under the Tender and had been disqualified from the tender process as a result of its acts and omissions.

2.3 Consequently, on 8th May, 2019, and under Cause No. 2019/HPC/0203, the appellant issued a writ of summons against the respondents. As against the 1st respondent, damages for breach of the terms of the Instructions to Tenderers; a declaration that the 1st respondent has no legal right to demand and that the 2nd respondent has no legal obligation to pay the sum of US\$3, 000, 000.00 to the 1st respondent, the subject of the tender bond; an injunction to restrain the 2nd respondent from paying the sum of US\$3, 000, 000.00 to the 1st respondent.

2.4 By order dated 14th June, 2019, Judge K. Chenda consolidated Cause No. 2019/HPC/0205 (between the 1st respondent as applicant and the appellant as respondent) with Cause No. 2019/HPC/0203. In the meantime, there was a third matter

pending before Judge E. L. Musona, that is, Mart Solutions & Others v Cooperativa Muratori Cementisti - CMC Di Ravenna Limited & Another under Cause No. 2019/HPC/0280 being a winding-up petition brought by several parties against the Cooperativa Muratori and Cementisti – CMC Di Ravenna Limited (CMCZambia), to which the appellant joined as an interested party.

2.5 Under the consolidated matter the 1st respondent applied for entry of summary judgment against the 2nd respondent. In reaction a motion was filed by the appellant to dismiss the said application and to stay proceedings. At the hearing of the applications, the court below asked the parties to address her on whether Cooperativa Muratori & Cementisti – CMC Di Ravenna, the appellant herein, is the same entity in the winding up matter before Judge Musona under Cause No. 2019/HPC/0280.

2.6 In a ruling dated 12th December, 2019, Judge Mwenda-Zimba dismissed the applications for summary judgement and stay of proceedings for lack of merit; as it was not clear which company was being wound up, the court adjourned the matter pending

judgment of the winding-up petition before Judge Musona to the 21st January, 2020 for a status conference.

2.7 In a ruling dated 19th February, 2020, Judge Musona, under Cause No. 2019/HPC/0280, also considered an application to stay the matter therein pending a ruling before Judge Mwenda-Zimba. The application was at the instance of the appellant as an interested party therein, being Cooperativa Muratori & Cementisti – CMC Di Ravenna Societa Cooperativa. By the time Judge Musona rendered his ruling, Judge Mwenda-Zimba had already delivered her ruling on 12th December, 2019.

2.8 In his ruling, Judge Musona dismissed the stay of proceedings as it had been overtaken by events in view of the earlier ruling of Judge Mwenda-Zimba, and proceeded to set 27th February, 2020 as the date for delivery of judgment in the winding-up petition.

3.0 **STATUS CONFERENCE IN THE COURT BELOW**

3.1 On 21st January, 2020, Judge Mwenda-Zimba held a status conference at which she was informed by Mr. Nkonde, counsel for the appellant that judgment in the winding-up petition had been reserved to 27th February, 2020. She then adjourned the

matter to 2nd March, 2020 for another status conference. On said return date, Mr. Nkonde informed the court below that as of 27th February, 2020, Cooperativa Muratori & Cementisti Zambia had been wound up under Cause No. 2019/HPC/0280. Counsel applied that the matter should proceed as the proceedings under Cause No. 2019/HPC/0280 had liquidated the Zambian entity.

3.2 Mr. Petersen, learned counsel for the 1st respondent had no objections but urged the court below to consider whether the winding-up of Cooperativa Muratori & Cementisti had any impact on the appellant. He asked the court to take into account the winding-up judgment when making orders for directions and to set another date for the parties and the court to consider the said ruling.

3.3 The court below then adjourned the matter to 13th March, 2020 for another status conference **“... to allow the court to consider the ruling in the winding-up petition of Cooperativa Muratori & Cementisti.”**

4.0 **ORDER OF THE HIGH COURT**

4.1 The record of appeal shows that on 13th March, 2020, the learned Judge proceeded to make an order in which she stated that she had considered the judgment in the winding-up petition under Cause No. 2019/HPC/0280 before Judge Musona. The learned Judge was of the considered view that the appellant herein, who was the plaintiff in the court below, is the same entity as the respondent entity in the petition.

4.2 The basis of the above holding by the court below being that in the tender bond documents in dispute, the appellant was cited as “*Cooperativa Muratori and Cementisti – CMC Di Ravenna*”. Further that the appellant had not produced any evidence to show that it was different from the respondent in the winding up Petition. Consequently, the appellant could only appear through the liquidator appointed in the Petition. She then adjourned the matter for a status conference to allow the liquidator to appear.

5.0 **GROUND OF APPEAL**

5.1 The appellant being dissatisfied with the Order, lodged an appeal on the following grounds:

- 1) *The High Court erred on a point of law and fact when, having scheduled the matter for a status conference on 13th March, 2020, instead delivered a ruling on a question of law and fact on its own motion without giving the parties the opportunity to be heard on the point;*
- 2) *The High Court erred on a point of law and fact when it held that the respondent in the matter entitled “Mart Solutions and Others v CMC Di Ravenna Limited Cause No. 2019/HPC/0280” is the same entity as the plaintiff in the matter entitled “Cooperativa Muratori & Cementisti – CMC Di Ravenna v Lufubu Power Company & NICO Insurance Zambia Limited Cause No. 2019/HPC/0203” on the grounds that:*
 - (a) *The Statement of Claim in the matter before the court cited the plaintiff as “Cooperativa Muratori and Cementisti – CMC Di Ravenna” and described it as a company incorporated in Zambia as a foreign company;*
 - (b) *The consideration of the Tender Bond that is in dispute revealed that the plaintiff in the matter before court was cited as “Cooperativa Muratori Cementisti – Di Ravenna” which is the name of the plaintiff in this matter and which is consistently cited as such in the winding-up petition;*
 - (c) *The reading of the documents in the winding-up petition and those in this case revealed that the plaintiff and the respondent in the petition were one and the same entity; and*
 - (d) *The plaintiff had not produced any evidence to show that it was different from the respondent in the winding-up petition when its own Statement of Claim showed that it was the same as the respondent in the winding-up petition.*

6.0 **APPELLANT'S ARGUMENTS**

6.1 The appellant relied on its heads of argument dated 14th September, 2020. We will only refer to the relevant arguments and not rehash in detail the submissions. It is submitted that the order being appealed against assails the holding by the court to the effect that CMC Zambia and the respondent in the winding up proceedings is the same entity as CMC Italy the appellant herein. The determination is said to be both of law and fact. Authorities were cited as to when a finding of fact can be reversed by an appellate court such as the case of **Nkata & Four Others v The Attorney General** ⁽¹⁰⁾ and **Wilson Masauso Zulu v Avondale Housing Project Limited** ⁽²⁾.

6.2 With respect to ground one, the appellant contends that no authority is conferred on the lower court at a status conference to determine a substantive issue raised in the pleadings, more so without affording the parties an opportunity to be heard. It was submitted that in terms of **Order 53 Rule 7(1) and (6) of the High Court Rules Chapter 27 of the Laws of Zambia**, the purpose of a status conference is to ascertain the status of the case, in particular, to ascertain whether directions issued at a

scheduling conference have been complied with, and does not extend to issues raised in the pleadings.

6.3 The appellant contends that the issue of whether or not CMC Zambia is the same as CMC Italy is a contested issue in the pleadings as seen from the statement of claim and the 1st respondent's defence, to be resolved at trial or by other means provided for under the rules. To this extent, the parties were never heard on a pleaded issue, which the lower court summarily determined. The court cannot make an order against a party without first affording that party an opportunity to be heard as decided in the cases of **Indeni Petroleum Refinery Company Limited v Kafco Oil Limited & Others** ⁽³⁾ and **Mulenga v Mumbi Ex-parte Mhango** ⁽⁴⁾

6.4 To emphasize the point, the case of **Richard Mofya v Staylon Employment and Investments Limited & Ecobank Limited** ⁽⁵⁾ was called in aid where the Supreme Court stated as follows:

“But on the record, we note that the issue of the irregularity of the writ of summons and statement of claim was not before the court at that stage. Therefore, even though the second respondent filed an application to set aside the writ of summons and statement of claim, the same did not come up for determination before the learned trial judge. What was

before the court was the appellant's application for an injunction. Hence, it is our view that the learned trial judge had no jurisdiction to make a determination on whether or not the writ of summons and statement of claim in question disclosed a cause of action against the second respondent as the issue was not before her.

....

Therefore, we find that the learned trial judge fell in error and misdirected herself when she made an order setting aside the writ of summons and statement of claim without having heard the second respondent's application for the same. ..."

6.5 It was argued that because the parties were not given an opportunity on the appointed day to address the court on the subject matter of its order, the net effect of the conduct of the court below, is that it volunteered the order of 13th March, 2020. Such conduct is frowned upon. As authority the case of **Murray and Roberts Construction Limited & Kaddoura Construction Limited v Lusaka Premier Health Limited & Industrial Development Corporation of South Africa** ⁽⁵⁾ was drawn to our attention.

6.6 It was contended that the court upon failing to render a decision due to lack of evidence, should have recalled the parties and heard their respective positions in light of the judgement on the

winding up petition on which the order was based. The appellant went on to refer us to what transpired on 29th Oct 2019 when the matter came up for hearing. After the court asked the parties to address it on the issue of whether CMC Zambia and CMC Italy are the same entity, the court did not pronounce itself on the issue and opted to wait for the decision in the winding up petition. Further that at the status conference date on 2nd March 2020, the court proceeded to render the ruling on the question raised on its own motion, which was volunteered and ought to be set aside.

6.7 The appellant contends that the order in dispute was made in the absence of evidence as the court below relied heavily on the judgment of the court in the winding-up petition. The parties and issues in the winding-up petition were different from those in the proceedings before the lower court. Consequently, the judgment in the winding-up petition did not provide sufficient evidence of the issues dealt with in the proceedings subject of appeal.

6.8 It was contended that a reading of the judgment of the court in the winding-up proceedings shows that it was dealing with the

winding-up of CMC Zambia, which is a foreign company registered in Zambia, and was not concerned with the difference in composition or nature between CMC Zambia and CMC Italy. The evidence before the court was not sufficient to enable the lower court judge to render a decision without affording the parties an opportunity to be heard on the issue in dispute. The parties should have been allowed to present admissible evidence for consideration. As authority the case of **Savenda Management Services v Stanbic Bank Zambia Limited** ⁽⁷⁾ was cited in which the Supreme Court took the position that the learned High Court Judge should have invited the parties to address him on the provisions of Section 50 of the Banking and Financial Services Act which he invoked, before proceedings to make his determination of the matter.

6.9 In a nutshell, that the court below ought to have accorded the parties an opportunity to address it on the relationship between CMC Zambia and CMC Italy.

6.10 In ground two, the appellants contend that the finding by the court below that the appellant herein is the same as the respondent in the winding-up proceedings based on averments

in the pleadings is unfounded at law. The cases of **Salomon v Salomon & Company Limited** ⁽⁸⁾ and **Associated Chemicals Limited v Hill Delamain Zambia Limited & Ellis and Company** ⁽⁹⁾ in addition to the provisions of **Section 16 of the Companies Act**, were cited for the proposition of law that upon incorporation, a company becomes a legal entity separate and distinct from the person shareholders that incorporate it. It acquires separate legal status.

6.11 Therefore, upon registration of a foreign company, the registered company acquires separate legal status with the name by which it has been registered. Similarly, in this case, it was contended that upon registration as a foreign company in Zambia, Cooperativa Muratori – CMC Di Ravenna Limited (Zambia) acquired separate legal status from that of Cooperativa Muratori – CMC Di Ravenna (Italy).

6.12 The appellant went on to submit on the implication of the name and winding-up of a foreign company incorporated in Zambia, under sections 253 and 312 of the Companies Act in force; which matters are prematurely or not relevant in our view to the substantive issue on appeal.

6.13 It was further submitted that the documents in the winding-up proceedings do not support the lower court's decision. In particular, the writ of summons at pages 13 to 14 of the record of appeal, cited the appellant as "*Cooperativa Muratori & Cementisti – CMC Di Ravenna*" and whose address for service is "Via Trieste 7648122, Ravenna, Republic of Italy", and is further described in the statement of claim at pages 15 to 19 of the record of appeal as "... a company incorporated in the Republic of Italy and has been incorporated in Zambia as a foreign company ..."

6.14 Whereas the petition in the winding-up proceedings at page 504 of Volume 2 of the record of appeal, names the company in issue as "Cooperativa Muratori & Cementisti CMC Di Ravenna Limited". Thus, the submission that there is a clear distinction between the company suing in the lower court and that of the company being wound up. The name of the appellant *in casu* does not end with 'Limited or Ltd' as per the requirement under section 36(2) of the Companies Act as it was incorporated in Italy, while CMC Zambia in the winding-up petition does. We were referred to the case of **S.P. Mulenga Investment Limited**

v Weluzani Zulu ⁽¹⁰⁾ where the court held that S.P. Mulenga Associates International and the appellant therein were not one and the same company even though they shared the same directors. In our view this authority is inappropriate to the facts in this case.

6.15 In this regard, it was submitted that the court below could not rely on judicial notice in the pretext of seeking evidence to hold that two different entities were the same. The definition of judicial notice stated in **Shamwana and Other v the People** ⁽¹¹⁾ was cited.

6.16 As regards the reliance of the court below on the Tender Bond, the appellant submitted that a consideration of the bond shows that it was taken out on behalf of Cooperativa Muratori and Cementisti – CMC Di Ravenna and not Cooperativa Muratori and Cementisti Di Ravenna Limited. Therefore, it is not correct to say that the name on the bond is the same as that on the petition as the petition has the name Cooperativa Muratori and Cementisti – CMC Di Ravenna Limited, being a Zambian company.

6.17 In this regard, we were urged to set aside the finding of fact made by the lower court on the basis that it was made upon a misapprehension of facts as held in the case of **Justin Mwengwe v Examinations Council of Zambia** ⁽¹²⁾. That no court acting correctly could have reasonably held that the entities are the same.

6.18 The appellant prayed that the order by the court below be set aside in its entirety and that the appellant be allowed to prosecute its case in the court below before another judge and represented by an advocate of its choice with costs to the 1st respondent.

7.0 **1ST RESPONDENT'S ARGUMENTS**

7.1 The 1st respondent relied upon its heads of argument dated 21st September 2021. The respondent began by identifying the questions raised by the arguments advanced by the appellant as follows; whether the appellate court has the competence to overturn a finding of fact made by a lower court, whether the court below was on firm ground in determining its own motion the question of whether CMC Zambia and CMC Italy are one

and the same entity and whether CMC Zambia is a separate legal entity, distinct from CMC Italy.

7.2 As regards reversal of findings of fact made in the lower court by an appellate court, the appellant submits that no rule of law or procedure was violated. The findings of fact are not perverse, or made in the absence of relevant evidence or upon a misapprehension of facts. Reference was made to the cases of **Kristamma Naidu v Chapa Naidu** ⁽¹³⁾, **Examinations Council of Zambai v Relilance Technology Limited** ⁽¹⁴⁾; **H B Gandhi, Excise and Taxtion Officer- cum Assessing Authority** ⁽¹⁵⁾; **Kuldeep Sigh v Commissioner of Police** ⁽¹⁶⁾ and **Hamid v Khalid & Co-operative Insurance Society General Insurance Limited** ⁽¹⁷⁾. The authorities dealt with perverse findings of fact, what it means i.e arriving at a fact by ignoring or excluding material or by taking into consideration irrelevant material or a finding so outrageous that it defies logic or one that no reasonable judge could have reached.

7.3 It is submitted that the trial judge had a basis for arriving its decision, notwithstanding the adequacy of that basis. That the said decision cannot be said to be unequivocally wrong to the

point of being deemed unreasonable. Therefore, the criteria for overturning the findings of fact have not been met to warrant reversal. Particularly that we as an appellate court do not have the equivalent insight that comes with having a vantage point of the matter at trial.

7.4 In respect of the contention that the court below rendered a ruling without giving the parties an opportunity to be heard, the 1st respondent submits that the parties did make submissions before court on this question notwithstanding the fact that the evidence submitted was scant.

7.5 Further that Order XIX of the High Court Rules empowers a High Court Judge at a status conference to determine issues including such as the nature of the relationship between CMC Zambia and CMC Italy. Therefore, the court below was correct in making the determination. In addition that the appellant contradicts itself by arguing in one instance that the determination was made in the absence of evidence and in another breath contending that had the court addressed its mind to the correct evidence it would not have arrived at the decision subject of appeal. The appellant's dissatisfaction is

more with the decision and not that the court on its own motion made a determination.

7.6 The respondent went on to distinguish the cases cited by the appellant. In regard to the **Mulenga v Mumbi Ex-pater Mhango** ⁽⁴⁾, it was contended that the Supreme Court was referring to making to an order against a person/entity not party of the case. As regards the cited case of **Indeni Petroleum Refinery Company Limited** ⁽³⁾, the 1st respondent contends that the appellant misunderstood the context against which the words were said of inherent jurisdiction to weed out frivolous and vexation matters; which circumstances are not applicable to the facts here.

7.7 In response to the contention that the High Court Judge volunteered a ruling, the 1st respondent submits that the question of whether **CMC Zambia and CMC Italy** is the same entity was before the trial court and the parties were given the opportunity to submit evidence before the court.

7.8 On the issue of whether **CMC Zambia and CMC Italy** are the same at law, it was submitted that the two entities are, at law, the same. The 1st respondent proceeded to set out the

differences between foreign companies and subsidiaries under the **Companies Act No. 10 of 2017**.

7.9 Based on the provisions of **Sections 299 and 308 of the Act**, CMC Zambia is not separate from CMC Italy, but an arm firmly attached to the corporate ‘*arm*’ of CMC Italy. Therefore, the cited cases on the principle of separate distinct legal personality of an entity does not apply to the facts *in casu*.

7.10 The 1st respondent reiterated that it is a requirement of the law that the name of the foreign company must be the name it has in the country of incorporation. Having the word “*Limited*” at the end of all private limited companies is a prerequisite under our laws and does not automatically mean the two entities are different.

7.11 The provisions of **Section 299 of the Companies Act** was referred to extensively on the registration of a body corporate formed outside Zambia by lodging with the Registrar an application.

7.12 Emphasis being placed on the use of the word ‘*register*’ as opposed to the word incorporate. That in interpreting section 299 of the Companies Act, consideration should be given to the

literal meaning of the word registration as against the word “*incorporation*.” The contention being that section 299 of the Companies Act does intend to afford a branch of a foreign company separate legal personality. That a foreign registered company upon being wound up affects the branch of a foreign company registered in Zambia which would not exist independently of the foreign company. This is different to a company incorporated under the **Companies Act** which is distinct from any member of its group. We were on the above basis urged to dismiss the appeal for lack of merit with costs.

8.0 **2ND RESPONDENT’S ARGUMENTS**

8.1 In its heads of arguments filed on 20th October, 2020, the 2nd respondent indicated that it does not contest the appeal and adopted the heads of argument filed by the Appellant. The 2nd respondent prayed that in the event that the appeal is upheld, costs should not be ordered against them as they had consistently shared the appellant’s position in these proceedings.

9.0 **DECISION OF THIS COURT**

9.1 We have considered the record of appeal, the authorities cited and the arguments advanced by Learned Counsel for the parties. In the first ground of appeal, the appellant contends that the court below erred when it rendered a ruling on its own motion on a question of law and fact without first according the parties an opportunity to be heard on it having earlier scheduled the matter for a status conference.

9.2 The issue raised in ground one is whether the court below erred by ruling on a question of law and fact on its own motion without giving the parties the opportunity, to be heard. In a nutshell whether the parties were given an opportunity to be heard on the question of law and fact as to whether the appellant CMC Italy and the entity CMC Zambia in the winding up petition are the same.

9.3 In considering whether the judge accorded the parties an opportunity of full hearing and whether that hearing was reasonable, we must look at the court record of the proceeding before the High court.

- 9.4 We had earlier on narrated background facts of this matter up to consolidation and the cause under the winding up proceedings we will not rehash, save to state that the court below had earlier referred the matter to mediation and in event of failure, a scheduling conference was scheduled for the 16th of August 2019, which was adjourned to 27th August 2019. On 27th August 2019, the parties advised the court that mediation had failed.
- 9.5 The learned judge then asked the parties therein to address her on status of the appellant as she was aware that there was a winding up petition “*against a company with the names similar to those of the plaintiff.*” Because if it is the same company, the proceedings ought to be stayed. The court proceeded to issue orders for directions.
- 9.6 Meanwhile an application was made for entry of judgment by the 1st respondent against the 2nd respondent. In the middle of the proceedings of the above application, the judge stated that she had raised the issue that there was a winding up petition against the appellant, and asked the parties to address her on this issue. The parties then submitted *viva voce* on this issue.

The appellant contended that the entity CMC Italy was a separate entity from CMC Zambia being wound up. The 1st responded on the other hand contended that they were the same entity.

9.7 After hearing the parties, the court below reserved ruling to the 16th of December 2019 where further directions, if any would be given.

9.8 The court below rendered a ruling on the 12th December, 2019 and found that this was not a suitable case for entry of summary judgment and dismissed the application for lack of merit. In respect of the stay of proceedings the court below stated that;

“it was not clear as regards which company was being wound up. The evidence as to the status of the plaintiff (appellant) came from Counsel for all parties no documents were exhibited to this effect. It has thus been difficult to make a decision on this aspect.”

The court below further stated that because the winding up petition was heard, it was inclined to stay proceedings to avoid conflicting decisions since the claim by the 1st respondent may affect that of the appellant. Proceedings were stayed until the

decision on the winding up petition was made. The court below gave a return date for status conference returnable 21st January 2020 which was adjourned after delivery of the judgment in the winding up proceedings.

9.9 After delivery of the judgment in the winding up petition, the court below called for a status conference to issue directions. The judge in the court below, at the said status conference, informed the parties that she had read the judgment in the winding up petition and taken judicial notice of the proceedings in the winding up proceedings. She was of the considered view that the appellant is the same as the respondent in the petition. Further that no evidence had been produced to show that the appellant was different from the respondent in the winding up petition. Therefore the appellant could only appear through the liquidator.

9.10 Reverting back to the issue of whether the court below rendered a ruling on the status of the CMC Italy and CMC Zambia without giving the parties an opportunity to be heard, we are of the view that it is not in issue that the court below did ask the parties to address it on the issue of the entities' status *viva voce*

at the hearing of the application for entry of summary judgment. The parties submitted orally on this issue. The question is can this be considered a full hearing on the status of the entities in issue.

9.11 The issue of whether the appellant CMC Italy and CMC Zambia the company wound up, being the same entity is a contentious issue between the parties. In the statement of claim dated 8th May 2019, the appellant averred that it is and was at all material times a company incorporated in the Republic of Italy and has been incorporated in Zambia as a foreign company pursuant to the Company Act No 10 of 2017.

9.12 The 1st respondent in its defence dated 11th June 2019, denies that the appellant is a foreign registered in Zambia and averred that the appellant is in fact was a branch of a foreign company registered in Zambia.

9.13 The court below on two occasions stated that there was no evidence for her to determine the issue of whether the entities are the same or are separate legal entities. The court below opted to await delivery of judgment in respect of the petition to wind up.

9.14 We have perused the winding up petition under Cause 2019/HPC/0280 in respect of **Cooperativa Muratori & Cementist Di Ravenna Limited**. The company is described as a Limited Company registered under the Companies Act No 10 of 2017 as a Foreign Company with its offices in Lusaka. The basis for winding up being inability to pay debt owed to the creditors. The judgment in respect of the petition to wind up the foreign registered Company is dated 27th February 2020. Justice Musona wound up the said Foreign Registered Company. The issue of the legal status of the two entities; whether they are the same or separate was not touched upon. The Judge was merely determining whether the respondent in that cause should be wound up on the basis of inability to pay the creditors debt.

9.15 After delivery of the judgment above, which the court below took judicial notice of, the learned Judge concluded that the appellant and the respondent CMC Zambia in the petition is the same entity because the statement of claim showed that it is the same as the respondent in the winding up petition. The court stated that the appellant had not produced any evidence to

show that it is different from the respondent in winding up petition.

9.16 We are of the view that the parties in the court below ought to have been given a full hearing on the status of the entities, to bring evidence therein. The court below ought to have allowed the parties to adduce evidence on the issue of whether the entities in contention are the same. Evidence such as certificate of registration or incorporation from Pacra. Even annual returns of the foreign registered company which contains registered details of the shareholders, directors and office.

9.17 It is trite that the Companies Act 2017 provides for the registration of a foreign company. Therefore the court below ought to have allowed the parties to not only submit but to adduce documentary evidence which would show whether the entities are the same; whether the foreign legal entity merely has a representative office establishing minimal presence in the country, merely giving it a foothold in Zambia. And or whether the entity in Zambia is a branch office as argued by the respondent, which would mean the entity is wholly owned by the CMC Italy entailing a great legal liability. In addition

whether the entity is a subsidiary owed by the parent company operating as a separate legal entity. This status shields the parent company from legal liability in the host country.

9.18 Without such evidence, the court could not properly determine the status of the foreign registered company in Zambia in any manner. A foreign company is defined under the Act to mean a body corporate formed outside Zambia that has been registered under the Act or an existing foreign company. See section 297 of the Companies Act 2017. Therefore to ascertain whether the entities are the same or not, documentary evidence should have been adduced at the hearing by according the parties an opportunity to be fully heard on the issue.

9.19 We hold the view that the court below erred in law and fact by delivering a ruling on a motion raised *suo moto* without giving or affording the parties the opportunity to be heard and to present evidence on the contentious issue of whether the appellant herein and the respondent CMC Zambia in the winding up petition is the same entity. We are also of the view that the judge in the court below erred in law and fact by basing her holding on the mere fact that the statement of claim in the

matter before court cited the plaintiff as **Cooperative Muratori and Cementisti – CMC Di Ravenna** and on Tender Board documents and the petition to wind up. This above fact in our view is not conclusive. As earlier stated evidence needed to have been adduced such as registration documents of the foreign registered company etc.

9.20 In as much as the court below stated that the appellant had not produced evidence to show that it was different from the respondent in the winding up petition, the 1st respondent who averred that the appellant was the same as CMC Zambia also did not adduce evidence to prove the assertions.

9.21 In its defence and submissions, the 1st respondent pleaded and contends that the appellant is a branch of CMC Italy. No evidence was adduced supporting their position. No Search Forms and certificate of incorporation from Pacra to show that the appellant is registered as a branch of CMC Italy was adduced.

9.22 We reiterate our inescapable conclusion that the Learned Judge in the court below erred in law and fact by holding that the entities are the same without affording the parties a full hearing

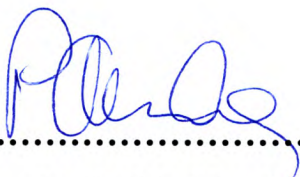
on the issue raised *Suo Moto*. We therefore set aside the ruling of the court below to the effect that the appellant is the same as the respondent in the petition. The record is remitted back to the High Court before another judge who shall hear the parties formally on the issue of whether CMC Italy and CMC Zambia are the same and thereafter proceed to determine the main action.

9.23 As regards costs, the 2nd respondent prayed that costs should not be awarded against it as it had adopted the position taken by the appellant, which position has succeeded. However, in view of the circumstances of the case, we order that costs in this court abide the outcome in the court below as between the appellant and the 1st respondent.



F. M. Chishimba

COURT OF APPEAL JUDGE



P. C. M. Ngulube

COURT OF APPEAL JUDGE



M. J. Siavwapa

COURT OF APPEAL JUDGE