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

APPEAL NO. 33 OF 2000
APPEAL NO. 112 OF 2004
SCZ/8/258/2009
APPEAL NO. 51 OF 2010

BETWEEN:

FIRST MERCHANT BANK ZAMBIA LIMITED (IN LIQUIDATION)	1ST APPELLANT
THE ATTORNEY-GENERAL	2ND APPELLANT
AND	
AL SHAMS BUILDING MATERIALS LIMITED	1ST RESPONDENT
JAYESH SHAH	2ND RESPONDENT

Coram : Hamaundu, Kaoma and Mutuna JJS

On 19th January 2022 and 15th March 2022

For the First Appellant: Mr. B. C. Mutale SC and Ms M. Mukuka of Messrs Ellis and Co. and Ms S. Kaingu – In-House Counsel for Bank of Zambia

For the Second Appellant: Mr. M. M. Lukwasa, Deputy Chief State Advocate, Attorney-General's chambers

For the First Respondent: Mr. H. H. Ndhlovu SC of Messrs H. H. Ndhlovu and Company, Mr. E. B. Mwansa SC of Messrs E. B. M. Chambers, Mr. M. B. Mutemwa SC of Messrs Mutemwa Chambers, Mr. M. Lisimba of Messrs Mambwe Siwila and Lisimba Advocates, Mr. A. Wright of Messrs Wright Chambers, Mr. J. Madaika of Messrs J and M Advocates and Mr. A. Kasolo of Messrs Mulilansolo Chambers

For the Second Respondent: In Person

RULING

Mutuna JS, delivered the ruling of the court.

Cases referred to:

1) **Attorney-General and another v Lewanika and four others (1993/1994) ZR 165**
2) **Chibote Limited and others v Meridien BIAO Bank (Zambia) Limited (in Liquidaton) (2003) ZR 26**
3) **R v Bow Street Metropolitan Stipendiary Magistrates and others ex parte Pinochet (1999) 1 ALL ER 1936**
4) **Savenda Management Services Limited v Stanbic Bank Zambia Limited Appeal number 37 of 2017 (ruling delivered on 24th November 2020)**
5) **Aristogerasimas Vangelatos and Vasiliki Vangelatos v Metro Investments Limited, King Quality Meat Products, Demetre Vangelatos and Maria Likiardo Poilou - SCZ judgment No. 35 of 2016**

Statutes referred to:

1) **The Supreme Court Rules, Cap 25**

Introduction

1) There are five motions before us which were referred to us by a single judge of this court pursuant to the rules of this court. The motions seek the settlement of five judgments into orders. There is a preliminary issue raised in relation to one of the judgments which seeks to object to the

settlement of the judgment into an order on allegation that the judgment is a nullity.

2) For reasons that become apparent later, the court did not determine the motions as presented and restricted its determination of the matter on the issues that were raised in a preliminary motion filed by the First Respondent and supported by the Second Respondent objecting to the settlement of one of the five judgments into an order and competence of four motions seeking settlement of judgments into orders. The questions posed by the court in determining the issues were as follows:

2.1 Whether or not the First Respondent was in order to raise a preliminary objection to its application for the settlement of the terms of the judgment of 6th July 2018 into an order;

2.2 A supplementary question arising from the first question was whether or not the procedure adopted by the First Respondent in seeking to nullify the judgment of 6th July 2018 was properly conceived;

2.3 Whether or not the applications to settle the four judgments into orders were properly presented in light of the fact that all the judges who formed the quorums in the four matters leading to the four judgments were no longer members of this court.

Background

3) On 6th July 2018, this court delivered a judgment following a motion filed by the First Appellant. Thereafter, counsel for the Respondents filed a summons on 7th January 2020 before a single judge of this court, pursuant to Rule 75 of the Supreme Court Rules, for the settlement of the judgment of 6th July 2018 into an order.

4) For the reasons best known to the First Respondent, it filed a notice of intention to object to its own application alleging that this court had no jurisdiction to hear the motion which resulted in the judgment of 6th July 2018. It accordingly sought the nullification of the judgment. In addition, the First Respondent questioned the jurisdiction

of the single judge to settle the terms of that judgment due to the fact that it is a nullity.

5) The Second Respondent supported the preliminary objection raised by its counterpart Respondent while the Appellants opposed it, alleging that it was an abuse of the process of the court.

6) While the events in the preceding paragraph unfolded before the court, the First Respondent filed four separate summons on 2nd September 2021 for the settlement of the terms of the judgments delivered by this court on the following dates: 2nd November 2000; 28th March 2006; 31st December, 2012; and, 2nd May 2014.

7) At a subsequent hearing of the motions on 26th May 2021, the single judge was confronted with the question: whether or not the objection raised by the First Respondent to its own motion should be heard first? The single judge was reluctant to hear the preliminary objection on the ground of jurisdiction since the application challenged the propriety of a judgment of the court.

8) With the concurrence of counsel for the parties, the single judge referred all the motions and the preliminary objection to this court in terms of the powers vested in him by rule 48(3) of the Supreme Court Rules. For completeness, we are compelled to reproduce the rule pursuant to which he acted. It states as follows:

> **"Any application made to a judge may be adjourned by him for the consideration of the court. In such event the applicant shall, before the date of the adjourned hearing file three extra copies of any affidavits filed by any respondent prior to such order for adjournment, for the use of the court."**

9) This is the backdrop to the hearing of the motions by this court.

Motion before this court

10) Counsel for the parties filed heads of argument in support and opposition of the motions. The First Appellant also filed a motion questioning the propriety of the First Respondent's preliminary objection to its application for settlement of the terms of the judgment of 6th July 2018.

11) At the hearing of the motions, we dealt with the questions to counsel which are in paragraphs 2.1, 2.2 and 2.3 to this

ruling. The first was ***whether or not the First Respondent was in order to raise a preliminary objection to its application for the settlement of the terms of the judgment of 6th July 2018.***

12) A supplementary question arising from this first question was ***whether or not the procedure adopted by the First Respondent in seeking to nullify the judgment of 6th July 2018 was appropriate.***

13) In relation to the main question, our quest was to determine whether the appropriate step for the First Respondent to take was to withdraw its initial application rather than raise a preliminary objection to its own application. While in relation to the supplementary question we sought to determine whether or not a party aggrieved by a judgment rendered by this court alleging want of jurisdiction or an injustice could challenge it in the manner the First Respondent sought to do in the motion. That is to say, by initially launching a motion for the settlement of the judgment into an order then raising

a preliminary objection to such motion on the ground that the judgment was in any event a nullity.

14) Counsel for the First Respondent, Mr. J. Madaika, went to great length at arguing the questions. He, despite the reminder by this court that what he was called to submit on were the questions posed, went to great length at attempting to justify his client's contention that the judgment of this court of 6th July 2018 is a nullity.

15) The portions of Mr. J. Madaika's arguments which were relevant to the questions posed sought to justify the preliminary objection against the motion to settle the judgment into an order by arguing that the motion was moved by the court, therefore, any of the parties were entitled to raise objection as they saw fit. According to counsel, a request to settle a judgment into an order cannot be said to be a motion raised by any party but a process towards conclusion of proceedings in an appeal subsequent to a judgment.

16) For this reason, Mr. Madaika argued, a party is at liberty to launch a preliminary objection to the motion. Counsel

went on to clarify that the preliminary objection is not directed at the propriety of the request to settle the judgment of 2018 into an order but rather to challenge the propriety of that judgment.

17) In response to a further question by the court as to whether the First Respondent's application as clarified in the preceding paragraph was properly conceived, Mr. Madaika answered in the affirmative. He argued that the First Respondent was not challenging the judgment of 2018 on the basis that it was made *per incuriam* in which case he would proceed by way of rules 48(5) and 78. But rather, the challenge sought to nullify the judgment based on the fact that the entire process leading up to its delivery was a nullity. Such a challenge, he concluded, can only be launched by way of rule 19.

18) Taking his argument further, counsel contended that he was on firm ground in raising the challenge to the judgment of 2018 as a preliminary objection because the matter had not yet been concluded as there was still pending before the court the issue of its settlement into an

order. Counsel acknowledged that applications relating to judgments of this court must be made within 14 days of delivery of the judgment, however, where there is still pending an application after the judgment, as in this case, time starts to run after the settlement of the judgment into an order. A party is at liberty at this point to launch any application especially one which was a jurisdictional question.

19) Mr. Madaika sought to justify the arguments in the preceding paragraph by contending that prior to settlement of the judgment into an order, a judgment of this court is not enforceable. He however, conceded that the practice at the Bar, which he had also engaged in, was that execution is levied even prior to settlement of a judgment into an order.

20) Mr. Lisimba augmented Mr. Madaika's arguments by contending that this court has no jurisdiction to settle a judgment into an order if the judgment is a nullity. He argued that this is what the First Respondent seeks to achieve by the preliminary objection it has raised. Counsel

did however, concede that the manner in which the application was presented was ill conceived.

21) The arguments by Mr. Mwansa SC by and large mirrored the arguments by his two counterparts. In summary, he argued that an opportunity has been presented to this court to revisit the judgment of 2018 while the proceedings are still alive. Like counsel before him, he did however, concede that the application to revisit our judgment was ill conceived.

22) The bulk of the arguments by the Second Respondent focused on the allegation that the 2018 judgment was a nullity. We have not considered these arguments because they departed from the questions posed by the court. We were urged to allow the motions.

23) In response to the Respondents' arguments, Mr. Mutale SC said that the Respondents had failed to answer the questions posed by the court on the propriety of the application to challenge the judgment of 2018. He contended that an applicant cannot launch an application

for reopening or rehearing an appeal in the course of an application for settlement of a judgment into an order.

24) State Counsel concluded that the Respondents had failed to support their application with any authority, consequently, the application is an abuse of the process of the court, which is magnified by the fact that they have launched an application attacking their earlier application. He urged us to dismiss the application.

25) Mr. Lukwasa echoed the prayer by Mr. Mutale SC that the application should be dismissed for being ill conceived.

26) In reply Mr. Madaika argued that this court has power to hear the jurisdictional issue raised notwithstanding the fact that the Respondents did not comply with the time limit prescribed for applying. He said that the jurisdictional plea was raised properly through substantive proceedings which were before a single judge of this court. As such, it is properly before this court as it is raised while proceedings are still pending in the matter.

27) To reinforce the reply by his counterpart, Mr. Lisimba urged us not to settle the judgment of 2018 into an order

because it is a nullity. He said this while acknowledging that the application to settle the judgment into an order was launched by his client. Counsel declined to accept any suggestion that the proper course to take was to withdraw the initial application to settle the judgment into an order.

28) Mr. Shah's reply was brief. He contended that the application is not flawed without giving any specific reason. In essence he was contending that the application to nullify the judgment of 2018 is properly presented before us.

29) The next question posed by the court was ***whether or not the applications to settle the four judgments into orders were properly presented in light of the fact that none of the judges who formed the quorums in the four appeals leading to the four judgments were still members of this court***. In other words, the court wished to know why the applications were made so late after delivery of the judgments and if this court is competent to settle the judgments in light of the provisions of rule 75 which require the presiding judge or any other

judge who sat at the hearing to settle the judgment into an order.

30) Mr. Madaika argued that in interpreting rule 75 we must adopt the purposive approach as we did in the case of ***Attorney-General and another v Lewanika and four others***[1]. In that case we said that Acts of Parliament ought to be construed according to the intention expressed in the Acts themselves. If the words of the statutes are precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. Whenever a strict interpretation of the statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it by reading words into it if necessary, so as to do what Parliament would have done if it had considered the situation which has arisen.

31) Mr. Madaika urged us not to apply the literal rule of interpretation as it would lead to an absurdity especially given the fact that we are living in the shadows of a COVID 19 pandemic. Counsel was saying that a strict application of the rule by limiting the function of settlement of a

judgment into an order only to those who sit on the panel is risky in view of the reduction in life expectancy as a result of the pandemic.

32) Counsel declined to accept any suggestion by the court that the time limit prescribed by Order 48(5) of making an application after judgment applies to applications for settlement of a judgment into an order. He reinforced his argument by contending that the court had, in any event, not pronounced itself on this issue. As such, there was no precedent to that effect.

33) After being prompted by the court, counsel stated that the rationale for requiring one of the members of the panel which presides over an appeal to settle the judgment into an order was a sensible one because the members of the panel would understand the judgment better than those who were not part of the panel. This fact notwithstanding, counsel was emphatic that the four judgments are the judgments of this court, as such we have jurisdiction to settle them into an order although none of us sat on the panels which delivered the judgments.

34) In his arguments, Mr. Shah addressed a question posed by the court as to why the Respondents had delayed in moving the court in launching the applications to settle the judgments into orders. He argued that the two Appellants enjoy immunity from execution of court process, as such the judgments could not be executed. He also argued that there are conflicting decisions in the judgments of 2000 and 2006 and the 2018 judgment which he wishes to bring to the attention of the court to demonstrate how it had ridiculed itself.

35) In response, Mr. Mutale SC argued that the application was also misconceived for being in contravention of rule 75. According to state counsel, the rule can only be fulfilled through a judge who presided over the appeal or one who sat on the panel hearing the appeal. State counsel went on to contend that Mr. Madaika's argument that we adopt the purposive approach in interpreting rule 75 is misconceived because the rule is not ambiguous.

36) Mr. Lukwasa echoed the arguments advanced by Mr. Mutale SC.

Consideration and decision by this court

37) In the earlier part of this ruling and as the record will show, the Respondents went to great length in trying to argue the application to nullify the judgment of 2018. These arguments have clouded the direction given by the court which was for the Respondents to:

37.1 demonstrate if the application to nullify the judgment of 2018 as presented was properly conceived;

37.2 if the provisions of rule 75 could be achieved with the current constitution of this court.

In the determination of the motions, we have answered the questions posed earlier in paragraphs 2.1, 2.2 and 2.3 to this ruling and thus determined the points at paragraphs 37.1 and 37.2. The determination has in no way strayed beyond these parameters for the reason that the nature of the matters before us required us to restrict ourselves only to the issues raised in the matter as they hinge on competence of the motions.

38) Coming to the first issue posed of whether or not a party can launch an application to nullify a judgment in the manner the First Respondent has launched it, there is no doubt that this court can entertain an application which seeks to challenge the legality leading up to a judgment of this court. This is in accordance with decision in the case of ***Chibote Limited and others v Meridien BIAO Bank (Zambia) Limited (in Liquidation)***[2] where this court said that it can reopen an appeal where a party through no fault of its own has been subjected to an unfair procedure. The decision adopted the reasoning of the Supreme Court of England and Wales in the case of ***R v Bow Street Metropolitan Stipendiary Magistrates and others ex parte Pinochet***[3] where the constitution of the panel which determined Pinochet's fate was questioned alleging that it was biased, therefore, nullified the decision of the court.

39) Later in 2020 in the case of ***Savenda Management Services Limited v Stanbic Bank Zambia Limited***[4], in a ruling delivered on 24th November 2020, this court went a step further and stated that an application seeking to

nullify a judgment on the grounds of unfair procedure or contesting an injustice must be by way of Rule 48(1) as read with rule 48(5). The ruling states in part as follows at page R54:

> **"The firm view we have taken is that, in so far as, the only avenue open to a person in situations such as the Applicant finds itself in and indeed contesting an injustice, is by way of motion or summons pursuant to rule 48(5), the same should be filed within the time limit prescribed by rule 48(1)."**

This decision makes it abundantly clear how the application which the First Respondent launched ought to be conceived and the time limit. The facts of this case as set out in the earlier part of this ruling reveal a glaring error on the part of the First Respondent.

40) In justifying the conception of the motion challenging the judgments of 2018, Mr. Madaika also argued that a jurisdictional issue can be raised at any point in proceedings before a court. While we accept that this is the position, as was affirmed by this court in the case of ***Aristogerasimos Vangelatos and Vasiliki Vangelatos v***

Metro Investments Limited, King Quality Meat Products, Demetre Vangelatos and Maria Likiardo Poilou[5], it must still be preceded by a motion properly launched in accordance with our rules otherwise, chaos would reign in this court. To this end, the application as it is defined by the motion to raise a preliminary objection is misconceived.

41) Turning now to the motion launched under rule 75, Mr. Madaika and Mr. Shah have taken the position that we should proceed to settle the four judgments into orders notwithstanding the fact that the presiding and other judges who constituted the panels from which the judgments arose are no longer in the court. They based their argument on the fact that the four judgments are defined as judgments of this court and as such can be settled by any member of this court. Lastly, it would be an absurdity if it were otherwise especially in the times we are living where life expectancy has been curtailed by the COVID pandemic.

42) Mr. Mutale SC held the view that rule 75 should be interpreted in its literal sense as it is clear and unambiguous.

43) We would like to begin addressing the question posed here by setting out the relevant provisions of rule 75 as follows:

> **"75(1) Every judgment of the Court shall be embodied in an Order.**
> **(2) It shall be the duty of the party who is successful in the appeal to prepare without delay a draft Order and submit it for the approval of the other parties to the appeal. If the draft is so approved, it shall be submitted to the presiding judge or such other judge who sat at the hearing as the presiding judge may direct. If the parties do not agree upon the form of the order, the draft shall be settled by the presiding judge or such other judge who sat at the hearing as the presiding judge may direct, and the parties shall be entitled to be heard thereon if they so desire..."**

What is apparent from the foregoing provision is that the duty to settle a judgment into an order is that of the successful party who should generate a draft order for approval by the losing party with expedition. Where the losing party agrees to the terms of the order the matter is referred to the court where the presiding judge or any

member of the panel of the court in the matter (designated by the presiding judge) settles the terms into an order.

44) In the absence of agreement by the parties, it is the preserve of the presiding judge or any other judge who sat on the appeal, as the presiding judge may direct, to settle the order following a motion at which the parties may be invited to submit on the issue. The provision does not call for settlement of a judgment into an order by a judge who was not a member of the panel of the appeal.

45) The rationale for this stems from the fact that, although the judgment to be settled is the judgment of the whole court, it is best settled by those who sat in the hearing and participated in the preparation of the judgment as they are uniquely qualified to do so because they were responsible for reducing the objective reasoning of the court into the reasoned judgment. Mr. Madaika agreed with this rationale. The rule is thus clear as to its intendment. To this extent there is no ambiguity in the rule calling for a purposive approach in its interpretation.

46) The position in this case is distinguished from that in the Lewanika case because in the latter case this court adopted the purposive approach not only to clarify an unclear provision in the Constitution but also to align it with the intentions of Parliament. Here, we hold the view that the literal interpretation of rule 75 aligns it to the intention of Parliament. Nothing more is therefore needed to bring clarity to it.

47) In addition, in the matters with which we are engaged, the four judgments sought to be settled are the 2000, 2006, 2012 and 2014 judgments. The panels were respectively as follows: Chaila, Muzyamba and Chibesakunda JJS; Sakala CJ, Silomba and Mushabati JJS; Mumba AG. DCJ, Mwanamwambwa and Wanki, JJS; and, Chibesakunda, AG.CJ., Wanki and Musonda JJS. Not only are some of these judges deceased but all have since retired from the judiciary. The latest one leaving in 2019, a fact known to the Respondents and long before the motions in respect of the judgments were launched in 2021.

48) The Respondent's predicament is compounded by the fact that none of the current members of this court were present when the discussions by the court were held in respect of the judgments because they were either in the lower courts or had not yet joined the Bench. While, it is acknowledged that this is a court of record, as Mr. Shah argued, discussions relating to matters in the court are confidential and only restricted to members of the court at the material time. There is, therefore, no way of knowing what informed the members of the court in arriving at the decisions in the four judgments to arm us with the capacity to settle the judgments into orders.

49) Mr. Madaika, has contended that if we apply the mandatory provisions of rule 75 in respect of settlement of the orders being restricted to the panels, it will result in an absurdity especially that we are living in times when the life expectancy is uncertain. The absurdity, if there is indeed one, results not from the interpretation of rule 75, which is justified in the earlier part of this ruling, but the inordinate delay by the Respondents in launching the

motions. They have themselves, and not the law, to blame especially that rule 75(2) requires the successful party "... *to prepare without delay ...*" the draft order. The facts of the motions speak for themselves, they were launched after an inordinate and unjustifiable delay, spanning the course of seven to twenty two years. It would be unjust and absurd to require judges of this court to settle judgments which were delivered long before they were members of the court.

50) We have not addressed the argument by Mr. Madaika that a judgment of this court is not enforceable unless settled in an order because this is an issue which will be addressed in a ruling pending before this court in which the First Respondent is a party. In any event, the argument had no relevance to the questions posed by the court.

51) Similarly, we have not yielded to Mr. Shah's argument that the delay in applying to settle the four judgments into orders is justifiable because no execution can lie against the two Appellants. Not only did we find this argument

unacceptable but redundant because it did not address any of the questions posed.

Conclusion

52) The ridiculous nature of the motion regarding the judgment of 2018 which is in unison with the motions in respect of the other four judgments, leaves us to conclude that all the applications before us are an abuse of the process of this court, and ill conceived. They are dismissed with costs, which shall be taxed in default of agreement.

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E. M HAMAUNDU
SUPREME COURT JUDGE

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R. M. C. KAOMA
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE