

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL No. 16 of 2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

GREAT STONE MINE TECHNICAL SERVICE LIMITED

APPELLANT

AND

CHI-FRICA MINING LIMITED

1<sup>st</sup> RESPONDENT

RADIO PHOENIX (1996) LIMITED (T/A PHOENIX FM)

2<sup>ND</sup> RESPONDENT

CORAM: SIAVWAPA JP, CHISHIMBA, PATEL, JJA

On 26<sup>th</sup> March & 11<sup>th</sup> April 2024

For the Appellant: Mr. W.B. Nyirenda SC & Mr. W. Kaunda

Messrs. William Nyirenda & Company

For the 1<sup>st</sup> Respondent: No Appearance

For the 2<sup>nd</sup> Respondent: No Appearance

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## JUDGMENT

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Patel, JA, delivered the Judgment of the Court.

### **Cases Referred to:**

1. American Cyanamid v Ethicon Limited (1975) ALL ER 504.
2. Fraser v Evans (1969) 1 QB 349.
3. The Attorney General v. Marcus Achiume (1983) ZR 1.
4. Charles Mushitu v Swift Capital Limited -CAZ Appeal No. 110/2022
5. Afritec Asset Management Company Limited and CPD Properties Limited v The Gynae and Antenatal Clinic Limited and Kenneth Muuka -SCZ Selected Judgment No. 11 of 2019
6. Manal Investments Limited v Lamise Investment Limited -SCZ Judgment No. 1 of 2001
7. JCN Holdings Limited v Development Bank of Zambia Limited (2013) 3 Z.R 299
8. Antonio Ventriglia and Manuela Ventriglia v Finsbury Investments Limited - SCZ Appeal No. 02 of 2019

### **Legislation and Rules Referred to:**

1. The Rules of the Supreme Court, 1999 Edition (White Book).
2. The Court of Appeal Act No. 7 of 2016 & Rules, Statutory Instrument No. 65 of 2016.
3. The Supreme Court Act, Chapter 25 of the Laws of Zambia

### **Other Works Referred to:**

1. Patrick Milmo, and M.V.H. Rogers (Eds), Gately on Libel and Slander, Eleventh Edition, (Sweet and Maxwell & Thomson Reuters) London, 2008.

## **1.0 INTRODUCTION**

- 1.1 This appeal challenges a Ruling delivered by **Lamba J** of the High Court on 23<sup>rd</sup> September 2022 in which the Learned Judge ruled in favour of the Respondents and determined that this was not a proper case to grant the Appellant's application for an order of interim injunction.
- 1.2 Consequently, the *ex parte* order of injunction, which was earlier granted against the Respondent was discharged, forming the subject of this appeal.
- 1.3 This appeal, *subject to our comments below*, ordinarily should canvass issues of interest in the public domain, and how far Courts will go in protecting the interest of one party *viz* the right to freedom of reporting and publication. The Appellant, in *casu*, has canvassed the position that the matter being one of an alleged defamatory claim, the lower court ought to have examined the defence filed by the 2<sup>nd</sup> Defendant to establish whether it was relying on the defence of fair comment, justification or any other available defence.
- 1.4 We are however, constrained to confine our judgment, to issues of procedure and whether the appeal is properly before the Court.

## **2.0 BACKGROUND**

- 2.1 The Appellant (Plaintiff in the Court below), commenced these proceedings against the 1<sup>st</sup> & 2<sup>nd</sup> Respondents (1<sup>st</sup> & 2<sup>nd</sup> Defendants as they were

below), by way of Writ of Summons and Statement of Claim, on 15<sup>th</sup> August 2022, seeking the following reliefs:

- i. *Damages against each Defendant;*
- ii. *A retraction of the publication;*
- iii. *A public apology in a widely circulated newspaper, on radio and social media;*
- iv. *An Injunction to restrain the Defendants and each of them by themselves or by their servants or agents or otherwise howsoever and whomsoever from publication of the said words and/or putting into circulation, news media of whatsoever for dissemination to any person whatsoever stories containing defamatory words against the Plaintiff or indeed publications involving the Plaintiff.*
- v. *Costs of and incidental to these proceedings*
- vi. *Any other reliefs the Court may deem fit.*

2.2 On 15<sup>th</sup> August 2022, the Appellant filed into court an Ex-Parte and Inter-partes Summons for an Order of Interim Injunction pursuant to **Order 29, Rules of the Supreme Court**<sup>1</sup>, accompanied by an Affidavit in Support and Skeleton Arguments. The Summons was returnable on 18<sup>th</sup> September 2022.

2.3 On 9<sup>th</sup> September 2022, the 2<sup>nd</sup> Respondent filed its Memorandum of Appearance and Defence denying the Appellant's claims and averred that the publication was not malicious and false as the Appellant was given an

opportunity to refute the allegations before the publication and that the Appellant was not entitled to any of the reliefs sought.

2.4 The 2<sup>nd</sup> Respondent also filed an Affidavit in Opposition and skeleton arguments to the Appellant's application for an interlocutory injunction and deposed that the averments in the Appellant's Affidavit were admitted only to the extent that the 2<sup>nd</sup> Respondent published a statement on its Facebook page on that particular date, but denied the allegation that it was defamatory and argued that the Appellant had been given an opportunity to respond to the allegations before the publication, which invitation it declined.

2.5 On 21<sup>st</sup> September 2022, the Appellant filed its Affidavit and Skeleton Arguments in reply to the 2<sup>nd</sup> Defendants Affidavit in Opposition.

### **3.0 DECISION OF THE LOWER COURT**

3.1 For the purposes of this section, we will refer to the Appellant as the Plaintiff and the 2<sup>nd</sup> Respondent as the 2<sup>nd</sup> Defendant, as the Parties were in the lower court.

3.2 The Learned Judge considered the oral submissions, affidavit evidence and arguments advanced by Counsel relating to the application for the interlocutory injunction. In determining the application before the court, the learned judge observed two central issues:

- i. *Whether there is a serious question to be tried and the adequacy or lack thereof in view of damages among other considerations.*
- ii. *The aspect of the balance of convenience.*

3.3 The lower court noted that the above are delicate situations being the right of the Plaintiff not to have its reputation injured and the Defendant's right of expression and freedom of speech.

3.4 The learned Judge referred to the seminal case of **American Cyanamid v Ethicon Limited**<sup>1</sup> and quoted an extract as follows:

*"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; the plaintiffs' need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from him having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages. If the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where the balance of convenience lies"*

- 3.5 With the foregoing in mind, the learned judge indicated that she was swayed by the arguments in respect of the 2<sup>nd</sup> Defendant in this matter. She referred to the case of **Fraser v Evans**<sup>2</sup> cited by the 2<sup>nd</sup> Defendant, that the grant of the order sought by the Plaintiff is dependent on the nature of this case.
- 3.6 The learned judge was convinced that the defence of fair comment intended to be relied on by the 2<sup>nd</sup> Defendant, gave credence to the position they held. She explained that this is so, because in considering the likelihood of success of the Plaintiff in the matter on a *prima facie* basis, she held the view that the intended defence does avail the 2<sup>nd</sup> Defendant formidable ground.
- 3.7 The Learned Judge in arriving at her conclusion took the view that this was a proper case in which she could exercise her discretion to not grant the order sought. The application for an interlocutory injunction was accordingly declined. As a consequence, the lower court discharged the ex-parte order that had been granted.

#### 4.0 THE APPEAL

- 4.1 Dissatisfied with the decision of the lower court, the Appellant has appealed to this Court advancing two (2) grounds of appeal couched as follows:

1. *The Court below erred in law and fact when it held that “I find myself convinced that the defence of fair comment intended by the 2<sup>nd</sup> Defendant does give evidence to the position they hold. I say so because on considering the likelihood of success of the Plaintiff in the matter on a prima facie basis, I find that I hold the view that the intended defence does avail the 2<sup>nd</sup> Defendant a formidable ground”. The defence of fair comment is not pleaded by the 2<sup>nd</sup> Defendant.*
2. *The Court below erred in law and fact when it denied the Order sought by the Plaintiff and discharged the Ex parte Injunction despite the 2<sup>nd</sup> Defendant only raising the intended defence of fair comment in its Arguments without satisfying the test required to rely on the defence of fair comment.*

## **5.0 APPELLANT’S ARGUMENTS IN SUPPORT OF THE APPEAL**

- 5.1 We have duly considered and appreciated the Appellant’s Heads of Argument filed on 18<sup>th</sup> January 2023, together with the Record of Appeal.
- 5.2 As a starting point, the Appellant has drawn our attention to the case of **The Attorney General v Marcus Achime**<sup>3</sup>, in support of the principle that the findings made by the lower court were perverse and made in the absence of any relevant evidence or upon a misapprehension of the facts and has invited us to set them aside.



5.3 We note from the arguments advanced by the Appellant, that they have restricted themselves to general principles of injunctions, premised on the allegation of defamation, as opposed to discussing the merits of the main matter.

5.4 The Appellant has canvassed the position that the cited landmark case of **American Cyanamid v Ethicon Limited** centers around four key guidelines which must be considered in deciding whether to grant an injunction. These were stated as follows:

- a. Serious case to be tried;
- b. Adequacy of damages;
- c. Balance of convenience;
- d. Persuasion of the status quo

5.5 The Appellant has extensively quoted from the book **Gatley on Libel and Slander**<sup>1</sup> and has emphasized a move away from the restricted approach adopted in the **American Cyanamid Case**.

## 6.0 THE RESPONDENT'S HEADS OF ARGUMENT

6.1 It is noted that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents did not file heads of argument nor did they appear at the hearing.

## 7.0 THE HEARING

7.1 At the hearing of the appeal, State Counsel Nyirenda placed reliance on the heads of argument and invited us to note that for the defence of fair comment to succeed, it has to be pleaded and evidence led.

## 8.0 DECISION OF THIS COURT

8.1 Although this procedural issue has been recently interrogated and settled by the Apex Court, and us, on the matter, in the case of **Charles Mushitu v Swift Capital Limited**,<sup>4</sup> the number of appeals that have, and continue to come before this Court, compel us to deal, yet again, with the procedural question. The question being whether a party aggrieved by a decision denying an interlocutory injunction, should proceed by way of an appeal to the appellate court or by way of renewal of its application before a single judge of that Court?

8.2 The Supreme Court of Zambia, constituted by 5 members of the bench, in the case of **Afritec Asset Management Company Limited and CPD Properties Limited v The Gynae and Antenatal Clinic Limited and Kenneth Muuka**<sup>5</sup> considered an important question in the appeal, (after dealing with the substantive appeal), on the procedural aspect of how the appeal had been presented.

8.3 The question that the Supreme Court formulated was as follows:

*“Should a decision on an application for an interlocutory injunction be by way of appeal to the full bench of the Court?”*

8.4 The Apex Court, in the **Afritec Case**, re-visited its earlier position as had been espoused by the case of **Manal Investments Limited v Lamise Investment Limited**<sup>6</sup>, in which the Court had guided that an appeal from a decision of the High Court on an injunction should lie direct to the full bench of the Supreme Court.

8.5 The Supreme Court in its carefully articulated and reasoned decision, settled the procedural position that an application for an interlocutory injunction coming to the Supreme Court, or the Court of Appeal, does not result in a final decision or decision on appeal, because it is interlocutory in nature as it will pend the final determination of the matter in the High Court. The Supreme Court at **page J 22**, stated as follows:

*“Such application should thus be treated as such and be determinable by a single judge of this Court and the Court of Appeal by way of renewal of the application.”*

8.6 In *casu*, it is as clear as day, that the lower court refused an order of interlocutory injunction. The Appellant, ought to have approached a single Judge of this Court by way of renewal of the application which was denied by the lower court in accordance with **section 9** of the Court of Appeal Act and **Order 10 rule 2 (1) of CAR**<sup>2</sup>.

8.7 We are therefore constrained from considering the merits or otherwise of this ill-fated appeal on account of procedural impropriety and want of jurisdiction. This is in keeping with the holding in the case of **JCN Holdings Limited v Development Bank of Zambia Limited**<sup>7</sup>. We also echo the words of the Supreme Court stated in the case of **Antonio Ventriglia and Manuela Ventriglia v Finsbury Investments Limited**<sup>8</sup>, on a jurisdictional issue that out of nothing, comes nothing and that he gives nothing, who has nothing.

9.0 **CONCLUSION**

9.1 Consequently, we dismiss this appeal, for being improperly before us.

9.2 As there has been no representation by either of the Respondents, we make no order of costs.



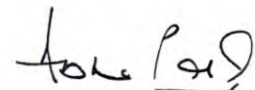
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**M. J. SIAVWAPA**  
**JUDGE PRESIDENT**



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**F.M CHISHIMBA**  
**COURT OF APPEAL JUDGE**



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**A.N. PATEL S.C.**  
**COURT OF APPEAL JUDGE**