

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 244/2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

WILLIAM AIDOO

(Sued as Chairperson for Expatriate Teachers Committee)

1ST APPELLANT

FINAL FRONTIERS AFRICA HOLDINGS LIMITED

(Sued as Consultant for Expatriate Teachers Committee)

2ND APPELLANT

AND

MORRISON NYARKU OBENG & 31 OTHERS

RESPONDENTS

THE ATTORNEY GENERAL

33RD RESPONDENT

CORAM: NGULUBE, MUZENGA AND CHEMBE, JJA.

On 30th April, 2024 and 31st May, 2024.

For the Appellants : Ms. M. Mukupa and T. Kasweshi – Messrs Ellis and Company

For the Respondents : Mr. J. Madaika, Messrs J & M Advocates

For the 33rd Respondent : Ms. K. Mofya, Acting Senior State Advocate, Attorney General's Chambers

J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Stanley Mwambazi vs Morrester Farms Limited (1977) Z.R. 108*
2. *Simeza Sangwa & Associates vs Hotellier Limited & Ody's Works Limited - SCZ/8/402/2012*
3. *Twampane Mining Co-operative Society Limited vs E and M Storti Mining Limited -SCZ Judgment No. 20 of 2011.*
4. *Zambia Revenue Authority vs Nasando Isikando & 3525 Others - SCZ/8/340/2012*
5. *Balkanbank vs Taher [1995] 2 All ER 904*
6. *Cornhill Insurance Plc vs Barclays [1992] CA Transcripts 948*

Legislation referred to:

1. *The State Proceedings Act, Chapter 71 of the Laws of Zambia*

Other works referred to:

1. *Rules of the Supreme Court (White Book) 1999 Edition*
2. *Halsbury's Laws of England, 3rd Edition*
3. *Black's Law Dictionary, 8th Edition*

1.0 INTRODUCTION

- 1.1 This is an appeal against the Ruling of the Honourable Mrs. Justice R. Chibbabbuka, High Court Judge- General Division in which she ordered that the 33rd respondent should pay the monies due to the 1st to 32nd respondents into Court.

2.0 BACKGROUND TO THE DISPUTE IN THIS APPEAL

2.1 The brief background to the matter is that the 1st to 32nd respondents (the plaintiffs in the Court below) commenced a matter seeking among other reliefs:

- i. A declaration that the varied Consent Judgment dated 25th July, 2020 was procured by fraudulent misrepresentation or mistake by the 1st and 2nd appellants (the defendants in the Court below) by adding 300 more persons without recourse to the respondents;*
- ii. An Order that the amounts due to all similarly circumstanced plaintiffs under the consolidated cause number 2007/HP/201 and similarly circumstanced plaintiffs who were not party to the consolidated matter be assessed and determined by the Court and that the 1st and 2nd appellants provide a comprehensive list of all similarly circumstanced expatriate teachers;*
- iii. An Order that the 3rd respondent directly pays the 1st to 32nd respondents the amounts now outstanding according to the number of teachers and teaching contracts executed between the 1st to 32nd respondents and the 33rd respondent;*
- iv. An Order that the 33rd respondent not disburse any further payments to the 1st and 2nd appellants until this*

matter is determined or until further order by the honourable Court; and

v. Costs.

- 2.2 The respondents made an application for an order for payment of money into Court by the 33rd respondent, pending determination of the matter. They contended that they had been receiving erratic payments for their dues from the 33rd respondent which were made through the 2nd appellant. That the 2nd appellant has been misappropriating money meant for the respondents and similarly circumstanced expatriate teachers.
- 2.3 It was averred that the respondents discovered after the commencement of the present action that the 2nd appellant had requested to be paid by the 33rd respondent monies due to the 1st to 32nd respondents. That if the monies were paid to the 2nd appellant, they would not properly be distributed and the action would be rendered nugatory.
- 2.4 They contended that it was in the interest of justice to order that the 33rd respondent directs the Ministry of Finance to pay the money into Court pending determination of the matter instead of paying to the 2nd appellant. That if the money was paid to the 2nd

appellant as was done previously, the respondent would have no recourse to recover their dues.

3.0 DECISION OF THE LOWER COURT

3.1 The learned Judge considered the evidence before her and was of the view that if the 33rd respondent continued remittance of the respondents' dues to the 2nd appellant, the Court's Judgment would be rendered an academic exercise if the varied Consent Judgment was set aside. The lower Court was also of the view that if the application was not granted, it was possible that persons who are not entitled to payment from the 33rd respondent would receive payment. That it was in the interest of justice that the monies owed to the expatriate teachers is paid into Court pending determination of the matter.

4.0 THE APPEAL

4.1 Dissatisfied with the Ruling of the Court below, the appellants launched this appeal advancing the following four grounds-

- 1. The Court below misdirected itself in finding that it was in the best interest of justice to grant the 1st to 2nd respondents' application for an order for payment of money into Court;***

2. *The Court below misdirected itself when it allowed the 1st to 32nd respondents' application for an order for payment of money into Court pending hearing and determination of the matter without having afforded the appellants and the 33rd respondent an opportunity to be heard;*
3. *The Court below misdirected itself when it granted the 1st to 32nd respondents' application for an order for payment of money into Court notwithstanding the Consent Order for stay of proceedings filed into Court by the parties on 11th May, 2023; and*
4. *The Court below erred in law in granting an application anchored on Order 29 of the Rules of the Supreme Court of England against the State.*

5.0 THE APPELLANTS' ARGUMENTS

- 5.1 The appellants filed Heads of Arguments into Court. Grounds one and two were argued concurrently while the other grounds of appeal were argued seriatim.
- 5.2 In support of grounds one and two, it was submitted that the Ruling being assailed was not made in the interest of justice because the appellants and the 33rd respondent were not heard.
- 5.3 It was submitted further that by Consent Order dated 11th May, 2023 the parties executed a Consent Order to stay proceedings for

30 days in order to secure the appellants and the 33rd respondents' opportunity to be heard on the application in the event that the *ex-curia* settlement failed. That however, the Court below did not sign the Consent Order which was filed a week before the Ruling but proceeded to deliver the Ruling dated 17th May, 2023.

- 5.4 The arguments advanced in support of ground three were the same as those in support of grounds one and two. Save to submit that that prior to 14th May, 2023, which was the date of the Ruling, the parties agreed to extend the time to facilitate an *ex curia* settlement, in accordance with **Order II Rule 2 of the High Court Rules**. That the lower Court did not adhere to **Order XIX Rule 3(2) of the High Court Rules, Practice Direction No. 10 of 1968** and **Article 118(2)(d) and (e) of the Constitution of Zambia** which demonstrate the spirit of the law regarding the facilitation of *ex curia* settlements and not paying undue regard to procedural technicalities. To buttress this argument, reference was made to the cases of **Stanley Mwambazi vs Morrester Farms Limited**,¹ **Simeza Sangwa & Associates vs Hotellier Limited & Ody's Works Limited**² and **Twampane Mining Co-operative Society Limited vs E and M Storti Mining Limited**.³

5.5 Counsel submitted that the lower Court gave no indication that the Consent Order would not be signed and did not give the appellants and the 33rd respondent an opportunity to be heard in opposition to the application, which was the intention of the Consent Order.

5.6 In ground four, it was argued that the effect of the lower Court's Ruling was that it essentially granted an injunction and an order for delivery of property against the state. Further that the Ruling prohibited the state from making payments through the appellants and made an order to pay the monies available to the Court. That the application in the lower Court was based on **Order 29 of the Rules of the Supreme Court** which provides for injunctions, detention and/or preservation of property but the application is prohibited by law in **Section 16 of the State Proceedings Act, Chapter 71 of the Laws of Zambia**. That this Section prohibits the grant of an injunction against the State. For the definition of injunction, reference was made to **Order 29/1A/2 of the Rules of the Supreme Court, Halsbury's Laws of England 3rd Edition** and **the Black's Law Dictionary 8th Edition**.

5.7 Lastly, it was submitted that for the foregoing reasons, this Court should set aside the Ruling of the lower Court.

6.0 HEARING

6.1 At the hearing of the appeal, the learned Counsel for the appellants relied on the grounds of appeal and heads of argument filed. The learned Counsel for the respondents Mr. Madaika and Ms. M. Mofya from Attorney General's Chambers were not permitted to file arguments in Court as they were way out of time and did not seek leave to file the same in the proscribed time.

7.0 CONSIDERATION OF THE MATTER AND DECISION OF THE COURT

7.1 We have carefully considered the record of appeal, the grounds of appeal and the Ruling appealed against. The grounds of appeal advanced by the appellants revolve around the lower Court's order that the 33rd respondent pays the sums due to the 1st to 32nd respondents into Court. The grounds of appeal shall therefore be addressed concurrently as they are intertwined.

7.2 This appeal raises three issues: whether it was in the interest of justice for the lower Court to have made an order for payment of money into Court without giving the appellants and the 33rd

respondent an opportunity to be heard; whether it was proper for the Court below to grant an order for payment into Court notwithstanding the Consent Order signed between the parties; and whether it was proper for the Court to grant an order of payment into Court which is equivalent to granting an injunctive relief against the state.

7.3 Regarding the first issue, it was argued that the appellants and the 33rd respondent were not given an opportunity to be heard. We have perused the record of appeal and the record of proceedings does not show what transpired at the hearing of the application for an order for payment of money into Court. However, on page 5 of the heads of argument the appellants explain what transpired at the hearing of the application for extension of time on 12th December, 2022. According to the appellants, at the sitting of 12th December 2022, the Court adjourned the matter for a Ruling on 14th May, 2023.

7.4 This could not have been a Ruling for extension of time because the Court had already granted the application. It is therefore safe to conclude that the matter was adjourned for a Ruling on the application for an order for payment into Court and the lower Court directed the parties to file their affidavits in opposition.

7.5 This position is confirmed on page R4 of the Ruling of the application for an order of payment into Court on page 18 of the record of appeal, where the lower Court stated that-

“At the hearing of 12th December, 2022, this Court directed that this application will be determined on the filed documents. The defendants were ordered to file their opposing affidavits and arguments, if any. On perusal of the record, this Court notes that the defendants have not filed any opposing arguments.”

7.6 We are therefore of the considered view that the appellants and the 33rd respondent were given an opportunity to be heard through the affidavits in opposition which they were directed to file into Court. The appellants and the 33rd respondents had about five (5) months to file affidavits in opposition but they did not do so. The lower cannot therefore be faulted for proceeding in the manner it did.

7.7 The second issue raised by the appellants is that the Ruling of the lower Court was proper in view of the fact that the parties had executed a consent order dated 11th May, 2023 to secure an opportunity for the appellants and the 33rd respondent to file an affidavits in opposition. That the Consent Order was for stay of proceedings for 30 days pending the parties' exploration of

possible *ex curia* settlement, but the Court proceeded to deliver the Ruling on 17th May, 2023.

7.8 We have perused clause three (3) of the Consent Order staying proceedings pending *ex curia* discussions which is on page 101 of the record of appeal. It provided as follows-

“That if no Consent Order/Judgment is filed by the parties within the stated thirty (30) days, then the matter shall, after the lapse of the said thirty (30) days, become active again and the defendants shall be at liberty to file affidavit(s) and skeleton arguments to the application for an order directing the 3rd defendant to pay monies into Court.”

7.9 Clearly the intention of the parties was that the proceedings in the lower Court would be stayed for thirty (30) days after which the appellants and 33rd respondent who would be at liberty to file affidavits in opposition to the application.

7.10 It is important to note the sequence of events that occurred prior to the parties executing the Consent Order. At the hearing of the application for extension of time on 12th December 2022, the Court granted the said application and adjourned the matter to 14th May, 2023 for Ruling. The Court directed that the application for payment of money into Court would be determined on the

documents and the parties would file into Court their affidavits in opposition.

7.11 After the hearing of 12th December, 2023, the affidavits in opposition were not filed but the parties proceeded to file the Consent Order staying proceedings on 11th May, 2023. By this date, the Court had already ordered the parties to file their affidavits in opposition. By entering into the Consent Order the parties were effectively varying the lower Court's direction to file the affidavits. The said Consent Order was not approved by the lower Court prior to delivering the Ruling.

7.12 It is trite that a Consent Order takes effect once it is approved by the Court. In the case of **Zambia Revenue Authority vs Nasando Isikando & 3,525 Others**⁴ the Supreme Court of Zambia relied on the English case of **Balkanbank vs Taher**⁵ where **Lord Justice Staughton** cited the case of **Cornhill Insurance Plc vs Barclays**,⁶ in which it was held that-

“When a Judge approves a Consent Order, it takes effect as if made by him after argument.”

7.13 It follows that since the Consent Order was not approved by the lower Court, it did not take effect and what the parties agreed upon merely remained an agreement between them. This implies

that the order given by the lower Court for the appellants and the 33rd respondent to file the affidavits in opposition was still subsisting at the time the Ruling was delivered. We are therefore of the firm view that the lower Court was on firm ground when it proceeded to deliver the Ruling despite the Consent Order executed by the parties.

7.14 The third issue raised by the appellants is that the Ruling of the lower Court was tantamount to granting injunctive relief against the state. For this position, the appellants relied on **Section 16 of the State Proceedings Act, Chapter 71 of the Laws of Zambia**, which prohibits the Court from granting injunctive reliefs against the state. The basis of the appellants' submission is that the lower Court ordered the 33rd respondent to pay the money owed to the respondents into Court.

7.15 We find it necessary to address our minds to the provisions of **Section 24 of the State Proceedings Act** which provides for attachment of moneys payable by the state. It provides as follows-

“(1) Where any money is payable by the State to some person who, under any order of any court, is liable to pay any money to any other person, and that other person would, if the money so payable by the State were money payable by a subject, be entitled under rules of


court to obtain an order for attachment thereof as a debt due or accruing due, or an order for the appointment of a sequestrator or receiver to receive the money on his behalf, the High Court may, subject to the provisions of this Act and in accordance with rules of court, make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that person or to the sequestrator or receiver.”

7.16 This Section allows for the Court to restrain any person entitled to receive money on behalf of another, from receiving that money and directing the payment to a sequestrator or receiver. In the present case it is clear that the parties had entered into a Consent Order for payment of money by the 33rd respondent to the 1st to 32nd respondents. Therefore, this is a debt that is due to the 1st to 32nd respondents. The appellants received the money on their behalf.

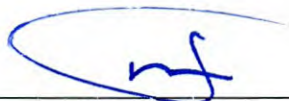
7.17 The said Consent Order is the subject of the proceedings in the lower Court in which the respondents alleged that the appellants misappropriated the money paid by the 33rd respondent. It is therefore our considered view that it was proper for the lower Court to have ordered for payment of monies due to the respondents into Court.

8.0 CONCLUSION

8.1 In the view we have taken, this appeal has no merit and we accordingly dismiss it. We award costs to the respondents, to be taxed in default of agreement.



**P. C. M. NGULUBE
COURT OF APPEAL JUDGE**



**K. MUZENGA
COURT OF APPEAL JUDGE**



**Y. CHEMBE
COURT OF APPEAL JUDGE**