

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 295/2022

HOLDEN AT

(Civil Jurisdiction)



BETWEEN:

URVESH JASVANTAL DESAI

APPELLANT

AND

PAN AFRICAN BUILDING SOCIETY (In liquidation)

RESPONDENT

CORAM: KONDOLO SC, MAJULA AND BANDA-BOBO JJA

On 28th March 2024 and on 20th June, 2024.

For the Applicant : Ms. B. Nachimba of Messrs J & M Advocates

For the Respondents : Ms. G. Mukulwamutiyo, In-House Counsel, Bank of Zambia

J U D G M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. John Mutale v Access Financial Services SCZ/24/2011**
- 2. Costellow v Somerset County Council (1993) 1 All ER 952**
- 3. Zambia Revenue Authority v Jayesh Shah (2001) ZR 60**
- 4. Puma Energy Zambia Plc v Competition Commission
SCZ/172/2015;**
- 5. The People v The Registrar of The University of Zambia,
Ex Parte Chitalu Gozo Lumbwe SCZ/8/40/1997.**

**6. Credit Africa Bank Ltd (in Liquidation) v Elias Kundiona
(2003) ZR 61**

LEGISLATION REFERRED TO:

- 1. The Banking and Financial Services Act, Act No.7 of 2017**
- 2. The Industrial Relations Court Rules, Chapter 269, Laws of Zambia**

1. INTRODUCTION

1.1. This is an appeal against the Ruling of Justice Honourable Mrs. Mwaaka Chigali Mikalile dated 15th August, 2022 under cause No. COMP/IRDLK/385/2022 in which she dismissed the Appellant's complaint against the Respondent.

2. BACKGROUND

2.1. Appellant's Case

2.2. The Appellant was employed by the Respondent as its Chief Executive Officer and Managing Director. His initial contract of service was signed in December 2015, the second one on 27th January, 2017 and the third and final one on 10th June 2019.

2.3. On 19th July, 2019, the Bank of Zambia took possession of the Respondent Company, placed it under liquidation and appointed Mr. Maibiba Mulala as Possession Manager.

- 2.4. Shortly thereafter, the Appellant's employment was terminated by a letter written by the Possession Manager.
- 2.5. The Appellant made a number of queries regarding his termination dues but they fell on deaf ears. His lawyers wrote to the Possession Manager demanding a redundancy package but he disputed the demand and informed the Appellant that he was exercising his power under the **Banking and Financial Services Regulations Act No.7 of 2017 (the Act)** to withhold the Appellant's emoluments.
- 2.6. The Appellant reacted by filing a Complaint in the Industrial Relations Division of the High Court on 19th May, 2022. He sought a declaration that the manner in which his appointment was terminated amounted to redundancy and he made various claims for emoluments arising from that event.
- 2.7. The complaint was supported by an affidavit providing background on how he was employed, his job description and how his employment was terminated.
- 2.8. He attested that his emoluments were being unreasonably withheld and he felt discriminated against because others were paid their emoluments. That the Possession Manager had failed to explain why the Appellant's dues were being withheld.

2.9. Respondent's Case

2.10. Instead of filing an Answer, the Respondent filed a Notice to Raise a Preliminary Issue Pursuant to **Rule 33 (1), Industrial Relations Court Rules, Chapter 269, Laws of Zambia (ICR)** claiming that the Complaint was improperly before the Court. The Respondent initially pointed to three grounds but eventually, only one ground remained as follows;

1. **That this matter is improperly before Court for failure to follow the steps laid down in the Banking and financial Services Act in line with the Supreme Court Judgment in the case of John Mutale v Access Financial Services Appeal No. 24 of 2011.**

3. PRELIMINARY ISSUE

3.1. Respondent's Arguments in the High Court

3.2. The preliminary application was founded on the Respondent's submission that the Appellant had not complied with **Sections 128 (4) (a) and 131 of the Act**. That the former section required the Appellant to file its claim with the Respondent within 60 days of its customer statement being made available and the

latter provided that within 21 days after filing of a liquidation schedule, the Appellant may file with the Court an objection to any step proposed.

3.3. It was submitted that the liquidation schedule was filed in the High Court Commercial Division under **cause No. 2019/HPC/BN/0351** and the Appellant had not filed his objection to the liquidation schedule within the prescribed 21-day period. That the Appellant was now out of time to do so.

3.4. The Respondent relied on the case of **John Mutale v Access Financial Services** ⁽¹⁾.

3.5. **Appellant's Arguments in the High Court**

3.6. The Appellant submitted that he was not bound by the provisions of **sections 128 (4) (a) and 131 of the Act** because he initiated the action herein about 9 months before the Respondent filed the liquidation schedule in the High Court Commercial Division.

3.7. He informed the Court that he had filed a notice of complaint under **Cause No. IRCLK/438/2019** which was withdrawn for want of jurisdiction by Judge Makubalo. He submitted that the Possession Manager was therefore well aware of his claim at the

time of preparing the liquidation schedule and cannot now claim that the Appellant was out of time for raising an objection.

- 3.8. It was further submitted that the complaint shows that there is a dispute with regards the payable amounts and that the Court had jurisdiction to determine the issues.
- 3.9. The Appellant cited the cases of **Costellow v Somerset County Council** ⁽²⁾ and **Zambia Revenue Authority v Jayesh Shah** ⁽³⁾ to the effect that matters should be heard on their substance and merit and not dismissed on account of procedural default.
- 3.10. That it was not mandatory for the Appellant to file an objection to the liquidation schedule because the Liquidator was aware of his claim and factored it in during preparation of the schedule.
- 3.11. The Appellant submitted that the Liquidation Manager had not shown that he had complied with **section 128 (3) and (4)** of the Act which required him to file Customer's Statements before filing the liquidation schedule. Further that no proof had been shown that the Appellant was made aware of the existence of the Customer Statement.
- 3.12. The Appellant opined that the requirement to file an objection to the liquidation schedule was not mandatory because it

stated that a claimant “may” file an objection, meaning that the Court had room with which to exercise its discretion. In support of this, he cited the cases of **Puma Energy Zambia Plc v Competition Commission** ⁽⁴⁾; **The People v The Registrar of The University of Zambia, Ex Parte Chitalu Gozo Lumbwe** ⁽⁵⁾.

3.13. It was further argued that the Appellant was not bound by the amount stated in the liquidation schedule and the Court should assess the amount due to him.

3.14. The Appellant noted that the **John Mutale Case** *supra* which was heavily relied on by the Appellant was decided in 2011 before **the Act** was enacted. He opined that the cited case was therefore decided on the basis of repealed case law and was therefore no longer applicable.

4. HIGH COURT DECISION

4.1. The trial Judge noted that the complaint and affidavits filed by the Appellant showed that he has always been aware of the liquidation proceedings. On this basis the trial Judge found, as lacking in merit, the Appellant’s argument that the Respondent had not provided proof that it made available the Customers statement as required by **section 128 (3)** of the Act.

- 4.2. The learned trial Judge further found that despite the matter being in Court, the Appellant had every opportunity to object to the liquidation schedule as provided for under **section 131** of the Act but chose to not do so.
- 4.3. That the Appellant was a recognised creditor of the Respondent and his complaint amounted to raising an objection to the liquidation schedule.
- 4.4. The learned trial Judge recalled that in the **John Mutale Case** *supra*, the Supreme Court held that when Bank of Zambia took possession of the Respondent (Access financial Services) the Appellant (John Kanyanta Mutale) was required by law to follow the procedure provided by the now repealed Banking and Financial Services Act, Chapter 387, Laws of Zambia (**the repealed Act**)
- 4.5. The lower Court observed that the provisions in **the repealed Act** and in particular **sections 104, 105 and 106** were similar to those in the current law, as the former provided for making a Customer's Statement available, the latter provided for filing the liquidation schedule and **section 106** provided for the filing of an objection.

4.6. The learned lower Court stated that the reasoning of the Supreme Court in the **John Mutale Case** *supra* with regard to what happens when the Bank of Zambia places an institution under compulsory liquidation was still applicable.

4.7. The Preliminary Issue was allowed and the action was dismissed for being improperly before the Court

5. APPEAL

5.1. Aggrieved by the decision, the Appellant quickly filed an appeal on the following grounds;

1. The learned Puisne Judge erred in law and fact when in determining whether the Complainant (Appellant) was mandatorily obligated to object to the liquidation schedule in accordance with the Banking and Financial Services Act (the Act), used the provisions of section 131 of the Act to rule against the Appellant when she properly found that it was not mandatory for the Appellant to file an objection to the liquidation schedule.

2. The learned Puisne Judge erred in law and fact when she held that the Complainant was by these proceedings raising a claim to the liquidation

schedule when the evidence presented before her revealed that the Complainant's claim was filed on the date that the Respondent was placed under liquidation.

- 3. The learned Puisne Judge erred in law and fact when she dismissed the Complainant's complaint and awarded costs to the Respondent when it is trite law that the Industrial Relations Division of the High Court does not ordinarily grant costs unless a party acts vexatious.**

5.2. Appellant's Arguments

- 5.3. In ground 1, the Appellant argued that the Respondent could not claim that the Appellant had failed to raise an objection when the liquidation schedule was only prepared and made available for inspection nine months after the Appellant had already filed his complaint under **Cause No. IRCLK/438/2019**.
- 5.4. It is also argued that the trial Judge focused only on the shortcoming of the Appellant's failure to file the complaint within the prescribed time but did not place any emphasis on the Respondent's failure to show that it had made available a Customer Statement as required by **section 128 (4)** of the Act.

It was submitted that the trial Judge misdirected herself by not undertaking a balanced evaluation of the evidence by only focusing on the shortcomings of the Appellant and not on those of the Respondent.

- 5.5. In ground 2, the gist of the argument was that the Appellant raised a claim the same day the Respondent was placed under liquidation. That this was done by filing a Notice of Complaint against the Respondent on the 17th October, 2019 and he referred to page 22 of the record of appeal. However, a look at the document on page 22 shows that it was filed on 23rd August 2021 and not 17th October, 2019.
- 5.6. The Appellant repeated the argument he had advanced in the High Court that the John Mutale case was not applicable to this matter because it was decided in 2011 prior to the enactment of the Act.
- 5.7. He further repeated his argument that the use of the word “may” meant that it was not mandatory for a party to file a complaint against the liquidation schedule.
- 5.8. The Appellant’s further argument is that he should be entitled to pursue his claim before Court and not be limited to filing a claim against the liquidation schedule.

5.9. In ground 3, it was argued that this being an HC-IRD matter, the trial Judge erred by not giving reasons as to why she had awarded costs against the Appellant.

6. RESPONDENT'S ARGUMENTS

- 6.1. In ground 1, the Respondent argued that the trial Judge was on firm ground when she held that the matter was improperly before her and that the Appellant was out of time in filing his complaint.
- 6.2. That the requirement to file an objection to the liquidation schedule was not mandatory to everyone as it simply provided a choice. However, where one wishes to raise a dispute complying with the provisions of **section 131** of the Act, it becomes mandatory.
- 6.3. In ground 2, the Respondent argued that the **John Mutale** case applies in *casu* because the language in the new law and the repealed law is similar. That the Appellant's claim was recognised and appeared on the liquidation schedule and he should have objected to it as prescribed by the Act.
- 6.4. The Respondent referred to page 42 of the Record of Appeal to show that there was evidence before Court that the Respondent had prepared customer statements in accordance with the Act.

That the Appellant was attacking a finding of fact where the trial Judge had properly evaluated the evidence presented by both parties on that issue. That it is settled law that appellate Courts are slow to interfere with findings of fact made by trial Courts.

- 6.5. That in any event, the obligation under **section 128 (3) (b)** of the Act does not fall under the Respondent but falls on Bank of Zambia which is not a party to this case.
- 6.6. It was further argued that there was no merit in the Appellant's argument that he was entitled to have his dispute determined by the High Court because the law was clear that once a matter goes in to liquidation, the law regarding liquidations takes effect. That this is because such companies require to be administered in an orderly fashion for the benefit of all creditors. The case of **Credit Africa Bank Ltd (in Liquidation) v Elias Kundiona** ⁽⁶⁾ was cited to that effect and it was pointed out that **section 132 (1)** of the Act showed the priority of creditors. That attending to the Appellant's claim would give him undue advantage over other creditors.
- 6.7. In response to ground 3, it was argued that even though this was an Industrial Relations Division matter, the Respondent

was properly condemned in costs because he had brought a matter before the Court improperly.

7. THE HEARING

7.1. At the hearing both parties relied on the record of appeal and their filed heads of argument.

8. DECISION AND ANALYSIS

8.1. We have considered the arguments advanced by the parties and shall address grounds 1 and 2 together and ground 3 on its own.

8.2. Grounds 1 and 2

8.3. It is important that we reproduce the relevant law namely **sections 128 to 130 of the Banking and Financial Services Regulations Act No. 7 of 2017 (the Act);**

128. (1) In effecting a compulsory winding-up or dissolution of the financial service provider, in accordance with this Act the Bank may, in addition to any other powers, exercise the powers of the financial service provider concerned.

(2)

(3) Despite the Corporate Insolvency Act, 2017, and any other relevant written law, the Bank shall, after a decision to compulsorily wind up or dissolve a financial service provider—

(a)

(b) *cause to be made available at each branch for collection by each depositor, creditor, safe custody services customer and bailor of property held by the financial service provider, a customer's statement of the nature and amount for which each one's claim is shown in the financial service provider's records, and shall cause to be published in a newspaper of general circulation in Zambia, a notice informing all such persons of the availability for collection of the customer statement at their respective branches.*

(4) *A customer's statement, made in accordance with subsection (3), shall state that—*

(a) *a claim by the depositor or creditor shall be filed with the Bank within sixty days from the date of the customer's statement being made available; and*

(b)

130. *The Bank shall, within six months after the last day specified in a customer's statement, for the purpose of the filing of claims as provided in section 128 (4) (a) —*

(a)

(b)

(c) *file into Court, a liquidation schedule showing the steps that the Bank proposes to take;*

(d)

and

(e) *publish once a week for three consecutive weeks, in the Gazette, a newspaper of general circulation,*

or in other media in Zambia where the financial service provider had a branch, a notice of the date and place where the liquidation schedule is available for inspection, and the date, not earlier than thirty days after the date of the third publication of the notice, on which the Bank or person appointed shall file the liquidation schedule into Court. 131.

- (1) Within twenty days after the filing of a liquidation schedule, as specified in section 130 (c), a depositor, creditor or owner of a financial service provider, and any other interested party, may file with the Court an objection to any step proposed.*
- (2) The Court shall consider an objection, filed in accordance with subsection (1), and may—*
 - (a) order that appropriate modification of the schedule be made; or*
 - (b) set aside the objection.*

8.4. In our view, the argument that the liquidation schedule was filed after the Appellant had already commenced an action under **Cause No. IRCLK/438/2019** is irrelevant because the said cause was dismissed for want of jurisdiction and was therefore non-existent.

8.5. The relevant cause is the current matter from which the Judgment being appealed emanated, namely, **Cause No. COMP/IRDLK/385/2022.**

- 8.6. It was argued that objecting to a liquidation schedule is not mandatory because **section 130 (1)** of the Act employs use of the word “may”. We agree that not everybody who has a claim against the bank must file a claim against the liquidation schedule. Nobody is compelled to file a claim, but those who desire to raise an issue must do so in the manner prescribed by the Act. It is therefore mandatory in that sense and the Appellant’s argument on that score fails.
- 8.7. As correctly pointed out by the trial Judge the sections of law applicable to this matter in the repealed law and the current law are quite similar. There is nothing that suggests a change in the reasoning as to how litigation should be commenced with regards to banks over which the Bank of Zambia has taken possession.
- 8.8. Once Bank of Zambia takes possession of a bank, any litigation against such a bank is ring-fenced and litigation occurs within the confines of **Act No.7 of 2017** to ensure that the provisions of the Act are complied with. These provisions include how the assets of the bank will be distributed and the manner in which enforcement of Judgments, if any, will be conducted. For instance, where the process being undertaken by the bank of

Zambia results in compulsory winding up or dissolution of the bank, **section 132** of the Act prescribes the order of priority with regard to disbursements to the banks debtors.

- 8.9. We agree with the learned trial Judge that the reasoning in the **John Mutale** case cited by the Respondent continues to apply to liquidations under the current Act.
- 8.10. In these circumstances we therefore agree that the Complainant's claims are improperly before Court because as held in the **John Mutale Case**, all claims against a company in liquidation should be pursued in accordance with the process provided in **Act No.7 of 2017**.
- 8.11. In view of the position we have taken, all the remaining issues, including those that might be valid have become otiose as they should be pursued under the umbrella of **Act No.7 of 2017**. This appeal therefore fails and is accordingly dismissed.
- 8.12. With respect to ground 3 on the question of costs, as correctly argued by the Appellant, **Rule 44 of the IRC** states that in matters before the Industrial Relations Court costs can only be awarded against a party if such party is guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings or of other unreasonable conduct.

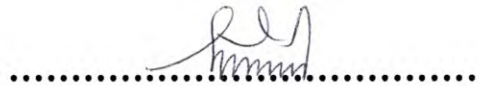
We detect no such conduct on the part of the Appellant and we order that each party bears its own costs.



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M.M. KONDOLO SC
COURT OF APPEAL JUDGE



.....
B.M. MAJULA
COURT OF APPEAL JUDGE



.....
A.M. BANDA-BOBO
COURT OF APPEAL JUDGE