

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE**

APPEAL NO. 117/2024

(Civil Jurisdiction)

BETWEEN:

FRANK LUMBWE KAKOMA

APPELLANT

AND

**JOSEPH MULENGA
ROGRY MUSENGE
PAUL GEOGITISIS**



CORAM: NGULUBE, MUZENGA AND CHEMBE, JJA.

On 14th October, 2024 and 30th October, 2024.

For the Appellant: Mr. A. Tembo, Messrs. Tembo Ngulube & Associates

For the 1st Respondent: No appearance

For the 2nd Respondent: No appearance

For the 3rd Respondent: Mr. K. Sianga & Mrs. R. Kasongo, Messrs.
Paul Norah Advocates

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Queen Elizabeth Mulenga vs Anthony Mulenga and Janet Mulenga 2014/HL/13*

2. *Attorney General and The Speaker of the National Assembly vs The People - SCZ Appeal No. 158 of 1999*

Works referred to:

1. *Rules of the Supreme Court (White Book) 1999 Edition*

1.0 INTRODUCTION

- 1.1 This is the appellant's appeal against a Ruling of Honourable Justice M. M. Wina (High Court Judge-General Division), delivered on 9th November, 2023 in which the Court ordered the 1st respondent to pay the appellant the balance of K200,000.00 (rebased) within 30 days from the date of receipt of the decanter from the appellant.

2.0 THE BACKGROUND

- 2.1 On 18th February, 2013, the appellant, who was the plaintiff in the lower Court commenced an action by writ of summons and statement of claim against the respondents (defendants in the lower Court) seeking the following reliefs:

- i. Damages for breach of contract in writing dated 23rd February 2011;*

- ii. Payment of the sum of K200,000.00 (rebased) being balance on the price for sale of 2,250,000,000 shares in Mukwa Breweries Limited to the defendants;**
- iii. Interest either pursuant to clause 3.2 of the agreement referred to in paragraph (ii) above or as per Judgment Act;**
- iv. Any other relief the Court may deem fit; and**
- v. Costs.**

2.2 In its Judgment dated 1st October 2019 the lower Court ordered the respondents to pay the appellant the sum of K200,000.00 (rebased) being the balance outstanding for the purchase of shares in Mukwa Breweries Limited by the respondents. The lower Court also ordered that the appellant shall return to the respondents the decanter belonging to Mukwa Breweries Limited which he removed from its premises.

2.3 On 10th October, 2023 the respondents made an application to set aside the writ of fieri facias and stay further execution to prevent the sale of the respondents' seized goods.

2.4 In support of the application, the 3rd respondent deposed that following the Judgment of the lower Court, he went to see the decanter that was removed by the appellant and found it in

pieces. That the appellant's advocates advised him to obtain a quotation for a new decanter from South Africa.

2.5 It was deposed that the appellant has failed to deliver the decanter with impunity and proceeded to issue the writ of fieri facias on the 3rd respondent's premises where a motor vehicle was seized.

2.6 In its Ruling dated 9th November 2023, the lower Court ordered that the 1st respondent shall upon receipt of the decanter, pay the balance of K200,000.00 (rebased) to the appellant within 30 days from the date of receipt of the decanter.

3.0 THE APPEAL

3.1 Dissatisfied with the Ruling of the lower Court, the appellant appealed to this Court advancing one ground of appeal couched as follows-

- 1. *“The Court below erred in law and in fact when it held at R9 that throughout this Judgment, ‘the common thread is the surrender of the decanter on exchange for the payment’ as it amounts to rewriting the earlier Judgment by Justice A.M. Sitali.”***

4.0 THE APPELLANT'S ARGUMENTS

- 4.1 The parties filed heads of argument for and against the appeal. In support of the sole ground of appeal, the appellant's advocates drew our attention to the Judgment of the lower Court at pages 199 to 200 of the record of appeal and argued that the Court below did not attach a condition that the sum of K200,000.00 would be paid to the appellant upon return of the decanter.
- 4.2 Counsel argued that the order of Justice Wina in the Ruling dated 9th November 2023, that the sum of K200,000.00 would be paid upon return of the decanter, amounted to reviewing the Judgment of Justice Sitali when there was no application to review it. That this was not tenable because the two Judges of the High Court were of equal jurisdiction and therefore the lower Court had no power to reverse the decision of another High Court Judge.
- 4.3 Reference was made to the case of ***Queen Elizabeth Mulenga vs Anthony Mulenga and Janet Mulenga***¹ where it was held that-

“It is established law pursuant to Section 4 of the High Court Act that this court has no power to review or set aside the decision of another High Court Judge because we are vested with equal jurisdiction, power and authority.”

4.4 Counsel argued that the lower Court’s order for the respondents to pay the outstanding amount and the appellant to return the decanter were mutually exclusive, entitling the respondents to issue a writ of fieri facias. That the order of the lower Court was a condition or unless order and that the respondents’ failure to enforce the judgment cannot prejudice the appellant. It was argued that the appellant was therefore entitled to execution in order to recover the sum of K200,000.00, with interest.

5.0 THE RESPONDENTS’ ARGUMENTS

5.1 In submitting on behalf of the respondents Counsel raised four issues that need to be determined by this Court, namely: what the rationale was for the Judgment dated 1st October 2019 delivered by Justice Sitali; whether the said Judgment was clear and the order needed to be perfected first; whether the Ruling of Justice Wina dated 9th November, 2023 clarified, rewrote or overruled the Judgment dated 1st October, 2019; and whether

the Court has jurisdiction to interpret its own Judgment or decision.

- 5.2 In submitting on the first issue, Counsel argued that a perusal of the Judgment shows that the lower Court made a finding that the three respondents were to pay the outstanding balance of K200,000.00 and that the appellant was to return the decanter to Mukwa Breweries forthwith. That the decanter was an integral part of the assets of the company and a determinant factor in conclusion of the sale transaction.
- 5.3 It was submitted that the use of the word '*forthwith*' meant that the appellant was to act first before the respondents could pay the balance. That the lack of clarity in the Judgment led to the appellant's interpretation that the two orders of the Court were mutually exclusive and attempted to levy execution. That this necessitated an interpretation of the Judgment.
- 5.4 Regarding the second issue as to whether the lower Court overruled the Judgment dated 1st October 2019, Counsel submitted that the Ruling dated 9th November 2023 was a mere interpretation of the Judgment dated 1st October, 2019 which was within the inherent jurisdiction of the lower Court. That the

Ruling of the lower Court did not make any variation of the Judgment or introduce new terms different from the spirit of the Judgment.

- 5.5 It was submitted that the Judgment of the lower Court needs to be looked at holistically in order to ascertain the true meaning and intent of the lower Court, as doing the contrary would distort the trial Court's true intention.
- 5.6 In arguing whether the Court has jurisdiction to interpret its own Judgment, it was submitted that there is nothing in the rules of the High Court or the White Book that precludes the Court from interpreting its own orders or judgments so as to give effect to their meaning. Reference was made to the case of ***Attorney General and The Speaker of the National Assembly vs The People***² to argue that the decision of the single judge of the High Court becomes the decision of the High Court. Reference was also made to ***Order 29/1A/10 of the Rules of the Supreme*** Court which provides for the inherent power of the Courts to make judicial pronouncements.
- 5.7 Lastly, Counsel prayed that the appeal be dismissed for lack of merit.

6.0 THE HEARING

- 6.1 At the hearing of the appeal, both parties relied on the heads of argument filed into Court. However, learned Counsel for the appellant augmented with oral arguments.
- 6.2 Mr Tembo submitted that the two orders made by the trial Court, that is payment of the sum of K200,000.00 by the respondents to the appellants, and the order for delivery of the decanter by the appellant to the respondents, were mutually exclusive orders and capable of being enforced independently. That however, only the appellant enforced the order made in his favour and so the lower Court made a grave error when it relied on the second order as a basis for setting aside the writ of fieri facias.
- 6.3 It was submitted that the Ruling of the Court below was tantamount to reversing the Judgment of the trial Court because the character of the Judgment was changed in that the trial Court did not order for any party to obtain quotations for the purchase of a brand new decanter. That this amounted to a review of the trial Court's Judgment when there was no application for review made in the lower Court.

- 6.4 Counsel submitted that the lower Court could have ordered for the parties to obtain quotations because of the respondents' averment in the affidavit in support of the application to set aside writ of fieri facias, that the appellant's advocates advised them to obtain the quotations. Counsel submitted further that the appellant was not given an opportunity to respond to the affidavit and so he could not refute the allegations.
- 6.5 Counsel prayed that the appeal be allowed and that the matter should be sent back to the Court below to review the Judgment of the trial Court, so that there is adequate material upon which the Ruling in contention can be made.
- 6.6 In response, learned Counsel for the 3rd respondent submitted that the appellant's application to adjourn the hearing of the application to set aside writ of fieri facias was denied and so the application was heard without the appellant's Counsel's opposition.
- 6.7 Counsel submitted further that this Court and the Court below have inherent jurisdiction to interpret or clarify an order of Judgment even in the absence of an application. That this appeal is an attempt by the appellant to create a favourable

situation for himself and to avoid the Judgment of the trial Court.

6.8 In reply, learned Counsel for the appellant contended that the main issue in this appeal is the order of the lower Court that the 3rd respondent should obtain quotations for the purchase of a brand new decanter. He argued that this has changed the complexion of the trial Court's Judgment.

7.0 DECISION OF THIS COURT

7.1 We have considered the record of appeal, the parties' arguments and the ruling of the court below. The question that this appeal raises is whether by its Ruling dated 9th November 2023, the lower Court departed from its Judgment dated 1st October, 2019.

7.2 The above question arises from the following order made by the lower Court in its Judgment-

“Having ordered the defendants to pay the plaintiff the outstanding balance, I further order the plaintiff to forthwith return the decanter to Mukwa Breweries Limited premises at his own cost.”

- 7.3 In view of the above order of the trial Court, the question before us is whether the return of the decanter was a condition for payment of the balance of K200,000.00.
- 7.4 In its Ruling dated 9th November 2023, the lower Court made the following finding-

“In conclusion therefore, a perusal of the relevant portion of the Judgment of 1st October 2019 does not by any stretch of imagination, state that the payment of K200,000.00 was independent of the delivery of the decanter. The Court made a clear and unequivocal finding that the three defendants were to pay the outstanding amount of K200,000.00 and further ordered the plaintiff to return the decanter. I base this finding on the fact that the decanter was an integral part of the assets of the company, and therefore the determinant factor for the value of the shares being paid for, was the return of the decanter.”

- 7.5 We concur with Counsel for the respondents that this Court needs to look at the lower Court’s Judgment holistically in order to give it the intended meaning.
- 7.6 It is important to note that the value of the decanter comprised part of the subject matter of the sale agreement between the

parties as it was among the assets of the company the respondents purchased from the appellant. It is on this basis that the Judgment of the trial Court clearly stated at page J27 that-

“This is particularly so as the evidence of the 3rd defendant was that after they signed the sale agreement, they proceeded to inspect the assets on the premises and as already noted, the terms of the agreement were that the plaintiff would hand over all the assets of the company. I therefore find that the plaintiff did not abide by the terms of the agreement as per clause 4.2.3 when he refused to return the decanter to the company premises. As he did not hand over the decanter which was an asset of the company according to the asset register he himself produced to the defendants, and since he did not disclose to the defendants who were the new shareholders of the company that he allegedly bought the decanter from the company, I find that the plaintiff has not proved his claim for damages for breach of contract against the defendants on a balance of probabilities.”

7.7 Having perused the Judgment of the lower Court, it is our considered view that the payment of the sum of K200,000.00 was not independent from the return of the decanter since the

lower Court found that the appellant had failed to prove his claim for damages for breach of contract because he failed to return the decanter.

7.8 The appellant's failure to return the decanter to the respondents was a material breach of the agreement as this means that the appellant did not perform his part of the agreement in full. It would therefore be absurd for the Court to allow the appellant to levy execution for recovery of the unpaid balance of K200,000.00 without the return of the decanter, when he did not perform his part of the agreement in full by returning the decanter which was a subject matter of the agreement.

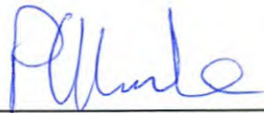
7.9 We are of the view that the lower Court was therefore on firm ground when it found that the sum of K200,000.00 would be paid to the appellant upon his return of the decanter.

7.10 Counsel for the appellant argued that the order of the lower Court for the 3rd respondent to obtain quotations or a new decanter, departed from the Judgment of the trial Court. Although the trial Court did not order any of the parties to obtain quotations for a new decanter, we note that in the affidavit in support of the application to set aside the writ of fieri

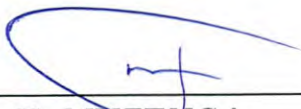
facias on page 170 of the record of appeal, the 3rd respondent deposed that after the delivery of the Judgment, he went to the appellant's premises to see the decanter, but found it in pieces. This averment suggests that the subject of the agreement between the parties was tampered with and it would be impossible for the 3rd respondent to obtain the decanter in the state it was at the time of the sale. The lower Court was therefore on firm ground when it ordered that the 3rd respondent should obtain quotations for a new decanter.

8.0 CONCLUSION

8.1 In the view that we have taken, we are of the opinion that the appeal has no merit and it is accordingly dismissed. Costs are awarded 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