

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

SP 70/2024

**CLEMENT MUGALA (RECEIVER)
INFINITY GROUP ZAMBIA LIMITED
(IN RECEIVERSHIP)**

**1ST APPLICANT
2ND APPLICANT**

AND

AM MEDIA LIMITED

01 NOV 2024 1ST RESPONDENT

BOKANI SOKO (PERSONAL SURETY)

2ND RESPONDENT

CORAM: Siavwapa JP, Chishimba and Patel, JJA

On 17th September, and 1st November, 2024

For the Applicants: Mr. C. Hamwela of Messrs. Nchito & Nchito

For the 1st Respondent: Ms. M.B Chilembo of Messrs T.S Chilembo
Chambers

For the 2nd Respondent: No Appearance

RULING

CHISHIMBA, JA, delivered the Ruling of the Court.

CASES REFERRED TO:

1. Bidvest Foods Zambia Limited & Others v CAA Import & Export Limited Appeal No. 56 of 2017
2. Zambia National Commercial Bank PLC and Ernestina Sakala & Others (SCZ/8/10/2021)
3. Zlatan Zlatkoauronotovic v Stanbic Bank Limited (SCZ/08/14/2020)
4. Citibank Zambia Limited v Suhalyi Dudhia (SCZ/8/08/2022)
5. Edgar Hamuwele (Joint Liquidator of Lima Bank Limited (In Liquidation) and Another v Ngenda Sipalo SCZ Judgment No. 4 of 2010

6. **Livingstone Motor Assemblies and Others v Indeco Estates Development Company (Appeal 4 of 2007)**
7. **Savenda Management Services Limited v Stanbic Bank Zambia Limited SCZ Appeal No. 37/2017 (Selected Judgment No. 10 of 2018)**
8. **Sinim Enterprise Zambia Limited & Harry Sinyangwe v Stanbic Bank Zambia Limited CAZ Appeal No. 2 of 2019**

LEGISLATION REFERRED TO:

1. **The Court of Appeal Act No. 7 of 2016**
2. **The Court of Appeal Rules S.I No 65 of 2016**

1.0 INTRODUCTION

1.1 The applicants by this motion, have, pursuant to **section 13 of the Court of Appeal Act No. 7 of 2016** (hereinafter referred to the as the “Court of Appeal Act”) and **Order 11 Rule (1) Appeal Rules S.I No 65 of 2016** moved the Court for leave to appeal to the Supreme Court against our judgment dated 23rd August 2024 and to stay execution pending appeal.

2.0 THE MOTION

2.1 The grounds upon which the applicants seek leave are that the intended appeal has merit and high prospects of success. Further, that it is a matter that raises points of law of public importance. In addition, that there are compelling reasons for leave to appeal to be granted and for the matter to be determined by the Supreme Court because the intended appeal raises novel issues of insolvency that are material to the development of the law on securities.

2.2 In the affidavit supporting the motion deposed to by Nkandu Chibuye, the deponent reiterated the grounds upon which the applicants seek leave to appeal. The deponent added that it would be in the interest of justice to stay execution of the judgment pending leave to appeal to avoid the appeal being a mere academic exercise.

3.0 AFFIDAVIT IN OPPOSITION

3.1 The 1st respondent filed a composite affidavit in opposition to the application for leave to appeal and for stay of execution pending determination of leave to appeal. The affidavit was deposed to by Catherine Mashoko, who stated that the applicants have not demonstrated that they have met the requirements for leave to appeal. It would not be in the interest of justice to grant the applicants leave to appeal as the 1st respondent would be denied the right to enjoy the fruits of its judgment.

4.0 ARGUMENTS BY THE APPLICANT

4.1 Counsel for the applicant referred us to **section 13 (3) of the Court of Appeal Act** which sets out the conditions an applicant must meet to be granted leave to appeal to the Supreme Court. Counsel contended that the intended grounds of appeal meet

the considerations stated. As authority, the Supreme Court cases of **Bidvest Foods Zambia Limited & Others v CAA Import & Export Limited Appeal** ⁽¹⁾ and **Zambia National Commercial Bank PLC and Ernestina Sakala & Others** ⁽²⁾, were cited where the principle considerations for granting leave to appeal were stated as follows; the likelihood of success, that the appeal raises a point of law of public importance or that there is some other compelling reason for the appeal to be heard.

4.2 On the point of law of public importance, we were referred to the Supreme Court case of **Zlatan Zlatkoauronotovic v Stanbic Bank Limited** ⁽³⁾ in which it was held that for a legal question to be treated as a point of law of public importance, it must have a public or general character rather than one that merely affects the private rights of the parties to the dispute. Further, in **Citibank Zambia Limited v Suhalyi Dudhia** ⁽⁴⁾, the Supreme Court stated that when granting leave to appeal the number of litigants to be affected by the eventualities is considerable and must be taken into account.

4.3 Counsel argued that the intended appeal addresses matters of public importance, as its outcome will impact not only the

parties involved but also the wider public affected by insolvency issues related to security documents.

- 4.4 On the prospects of success, learned counsel contended that it would be argued under the first proposed ground of appeal that the effect of this Court's judgment is that parties or unsecured creditors may commence court actions, obtain a judgment and attempt to enforce it while skipping the priority list of debtors outlined in the **Corporate Insolvency Act**. As a result of this Court's judgment, other parties subject to security documents may avoid honouring them. Hence the reason for the Supreme Court to decide on the matter.
- 4.5 We were referred to the case of **Edgar Hamuwele (Joint Liquidator of Lima Bank Limited (In Liquidation) and Another v Ngenda Sipalo**⁽⁵⁾ to highlight that an appointed receiver must manage the property and the affairs of the company to redeem the charge. Counsel submitted that the subject property and any proceeds should be dealt with by the Receiver as it is the property pledged by the 2nd applicant to discharge the debts of Elite Industries Limited. Allowing any other party to deal with the property would be against the provisions of the law.

5.0 **RESPONDENT'S ARGUMENT**

5.1 The thrust of the respondent's argument is that there is a fundamental flaw in the applicants' first proposed ground of appeal. Counsel contended that this Court established that the said property does not fall under the receivership. Further, the list of priority is only applicable to companies under insolvency and not receivership. As a result, the 1st respondent did not side-step the priority list, as there was no such list applicable to receivership, only to the winding-up of a company. The receiver's role is to settle debt only on behalf of his principal as stated in the case of **Livingstone Motor Assemblies and Others v Indeco Estates Development Company**⁽⁶⁾. Learned counsel submitted that the applicants misinterpreted **section 8 of the Corporate Insolvency Act**, which refers to the duty a receiver has to pay preferential creditors. In this instance, the Receiver was restricted to specific assets specified in the notice of appointment, namely moveable assets.

5.2 In rebuttal to the applicant's assertions that the intended appeal raises a point of law of public importance, Counsel contended that the applicants are seeking to enforce their private rights and this does not amount to a point of law of

public importance as required in **Bidvest Foods Zambia Limited & Others v CAA Import & Export Limited Appeal**⁽¹⁾.

In addition, there is no point of law raised but a question of fact which can be determined by reviewing the Notice of Appointment filed at the Patents and Company Registration Agency (PACRA) which showed that the said appointment was only in respect to moveable assets.

5.3 In arguing that the appeal has no reasonable prospects of success, counsel contended that the applicants have failed to demonstrate the prospects of success. Instead, they have erroneously demonstrated that the proceeds of sale of the subject property ought to be placed in a “common pool” for distribution according to the order of priority which relates to an insolvent company.

5.4 The case of **Livingstone Motor Assemblies and Others v Indeco Estates Development Company** ⁽⁶⁾ was cited to distinguish the role between a receiver and a liquidator.

5.5 Counsel argued that the applicants have not advanced any compelling reasons warranting the grant of leave to appeal. The applicants, having failed to meet the conditions for leave to

appeal to the Supreme Court outlined in **section 13 (3) of the Court of Appeal Act**, leave to appeal should be denied.

5.6 In respect of the applicant's application for a stay of execution, it was submitted that for this Court to grant a stay of execution, there must be special circumstances and compelling reasons to do so. In this instance, the applicants have not demonstrated any special or compelling reasons to justify a stay of execution, thereby preventing the first respondent from enjoying the benefits of their successful judgment.

5.7 Counsel further submitted that the applicant is in turn causing unjust delay and it would not be in the interest of justice for this Court to grant an order for stay of execution.

6.0 APPLICANT'S ARGUMENTS IN REPLY

6.1 The applicants filed arguments in reply in which they emphasised that the **Corporate Insolvency Act** is new and the sections have not been determined by the Supreme Court. It was contended that the interpretation of the provisions of the **Corporate Insolvency Act** are of a general application and importance to the public at large. Further, that the 1st respondent has not placed before this Court any decision by the

Supreme Court relating to the application of priority of preferential debts.

7.0 DECISION OF THE COURT

7.1 We have considered the motion, affidavit in support and opposition as well as the arguments advanced by the learned counsel.

7.2 **Section 13 (3) of the Court of Appeal Act** outlines four prerequisites upon which this Court may consider granting leave to appeal to the Supreme Court. The provision reads as follows:

“(3) The Court may grant leave to appeal where it considers that—

- a) the appeal raises a point of law of public importance;**
- b) it is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court;**
- c) the appeal would have a reasonable prospect of success; or**
- d) there is some other compelling reason for the appeal to be heard.”**

7.3 In the **Bidvest Foods Zambia Limited & Others v CAA Import & Export Limited Appeal⁽¹⁾** case, the Supreme stated the basis upon which to grant leave to appeal by holding that:

“Two final points on section 13(3)(a). First, it is always critical to bear in mind that under section 13(3)(a), the three different facets of the qualifying criteria for leave to be granted must be

satisfied. These are: (i) a point of law; (ii) of public importance; and (iii) raised in the appeal.”

7.4 In **Savenda Management Services Limited v Stanbic Bank Zambia Limited**⁽⁷⁾ the Supreme Court held that:

“The Court of Appeal must wait for a party to move it after it has delivered its judgment, seeking leave to appeal, and if it is satisfied that one of the grounds for granting leave has been satisfied, it must grant leave. If not, it must refuse the leave.”

7.5 For us to grant the applicants leave to appeal, they must therefore meet at least one of the grounds stated in **section 13 (3) of the Court of Appeal Act**. The applicants have anchored their application on grounds that the appeal raises a point of law of public importance, that it has reasonable success and that there is a compelling reason for the appeal to be heard.

7.6 In our Judgment, we found that the Third-Party Fixed and Floating Charge did not cover the subject property and held the view that the property, not being subject to receivership, could be sold by the 1st respondent. In the first intended ground of appeal, the applicants contend that our finding regarding the sale of the subject property undermines the application of the priority list in the **Corporate Insolvency Act**. As a result, they

argue, this creates an opportunity for parties to circumvent the established priority list through litigation.

- 7.7 The arguments put forth by the applicants are irrelevant to our judgment. The provisions of the **Corporate Insolvency Act** did not apply in our judgment as the dispute did not revolve around it but on what assets were charged by the Third-Party Fixed and Floating Charge.
- 7.8 Arguing that the appeal raises a point of law of public importance, the applicants submit that the issues surrounding the **Corporate Insolvency Act** are novel which the Supreme Court has not determined. We do not see what provisions of the **Corporate Insolvency Act** the Supreme Court needs to interpret or determine. The applicants have not identified which sections of the Act necessitate the Apex Court's intervention. Although they suggest that section 8, which addresses the payment of preferential creditors, has not been reviewed by the Supreme Court, we fail to see how its interpretation is pertinent to this case. We find that there are no specific provisions of the **Corporate Insolvency Act** that require interpretation or determination by the Supreme Court. And no novel issues are raised. In any event, as held in **Bidvest Foods Zambia Limited**

& Others v CAA Import & Export Limited Appeal ⁽¹⁾, the raising of novel issues does not by itself turn a matter into one that raises a point of law of public importance under **section 13 (3) of the Court of Appeal Act**.

7.9 Resultantly, ground one raises no point of law of public importance and has no prospects of success.

7.10 Similarly, ground two critiques our finding that the subject property was not covered by the Debenture when the Debenture expressly covered any and all the assets of the 2nd applicant. Our position was that as evidenced by the record, the notice of appointment specified that the appointment related to moveable assets. Our position is clearly stated in paragraph 8.15 of our Judgment. There is no compelling reason to grant leave to appeal

7.11 In our view, the proposed appeal has no merit and it falls short of the provisions of **section 13 (3) of the Court of Appeal Act**.

In our decision of **Sinim Enterprise Zambia Limited & Harry Sinyangwe v Stanbic Bank Zambia Limited** ⁽⁸⁾ we refused to grant leave to appeal to the Supreme Court because the intended appeal did not satisfy the provisions of **section 13 of the Court of Appeal Act**. We equally find that the application

for leave to appeal to the Supreme Court does not meet the requisite conditions under **section 13 (3) of the Court of Appeal Act**. We hereby refuse to grant leave to appeal.

7.12 Leave to appeal having been denied consequently renders the application for stay of execution moot.

8.0 CONCLUSION

8.1 In summary, leave to appeal is denied and the motion is dismissed with costs to the 1st respondent to be taxed in default of agreement.



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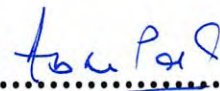
M. J. Siavwapa

JUDGE PRESIDENT



F. M. Chishimba

COURT OF APPEAL JUDGE



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A. N. Patel S.C

COURT OF APPEAL JUDGE