

IN THE SUPREME COURT OF ZAMBIA APPEAL NO.16/2017
HOLDEN AT NDOLA
(Civil Jurisdiction)



BETWEEN:

**BANK OF ZAMBIA (AS LIQUIDATOR OF CREDIT
AFRICA BANK LIMITED (IN LIQUIDATION)**

APPELLANT

AND

**AL SHAMS BUILDING MATERIALS
TRADING COMPANY LIMITED**

RESPONDENT

CORAM: Hamaundu, Kabuka, Chinyama, JJS.
On the 3rd March, 2020 and 9th April, 2020.

FOR THE APPELLANT: Mr N. Nchito, SC, Mr C. Hamwela, Messrs Nchito & Nchito.

FOR THE RESPONDENT: Ms. J. Mutemi, Mesdames Theotis, Mataka & Sampa Legal Practitioners.

JUDGMENT

KABUKA, JS, delivered the judgment of the court.

Cases referred to:

1. China Henan International Economic Technical Cooperation v Mwange Contractors Limited, SCZ Judgment No. 7 of 2002.
2. First Merchant Bank Zambia Limited (in Liquidation) v the Attorney General and Al Shams Building Materials Company Limited and Jayesh Shah, SCZ Judgment No. 17 of 2006.
3. Stephen Mukena Kongwa v Bank of Zambia, Appeal No. 52 of 2016.
4. ANZ Grindlays Bank (Zambia) Limited v Chrispin Kaona SCZ Judgment No. 12 of 1995.
5. Zinka v The Attorney-General, 1990 – 1992 Z.R. 73.
6. Wilson Masauso Zulu v Avondale Housing Project, 1982 Z.R.12.
7. Sendor Motors Limited v 3 Other Companies, SCZ Judgment No. 9 of 1996.
8. Vincent Mulevu Musukuma & Another v Major Baxter Chibanda & 2 Others, SCZ Appeal No. 21 of 2010.

Legislation and other works referred to:

1. The Banking and Financial Services Act, Cap. 387 S.104 (3) (a).
2. Supreme Court Practice (White book) 1999 Edition, Order 12 A/2/10.
3. Odgers on Civil Court Actions, Practice and Precedents, 24th Edition, 1996, London, Sweet & Maxwell.

1.0 Introduction

1.1 The appellant is appealing against a ruling of the High Court dated 18th June, 2010 which ordered it, as liquidator of Credit Africa Bank Limited (in Liquidation) to discharge its fiduciary duty and settle a final judgment delivered against the liquidated bank, in favour of the respondent.

2.0 Background

- 2.1 The facts of the case, to the extent that they are relevant for determination of this appeal, are that, on 1st October, 1997 *Credit Africa Bank Limited* ('the bank') and the respondent, *Al Shams Building Materials Company Limited*, entered into an agreement by which the respondent lent to the bank USD 350,000.00. It was a specific term of the agreement that the loan would attract 21% interest in the sum of USD 73, 500.00.
- 2.2 The loan was secured by a floating charge created over the bank's motor vehicles and executed in favour of the respondent on 6th November, 1997. Barely three weeks later, there was a run on the bank as a result of which on 28th November, 1997 the bank was placed under receivership. About one month after that development, on the 8th of December, 1997 the floating charge created over the bank's motor vehicles was registered with the Registrar of Companies.

3.0 Proceedings before the High Court and decision

- 3.1 As it turned out, the bank defaulted in repaying the loan. The receiver repudiated the floating charge and the respondent was compelled to seek legal redress before the High Court for recovery of USD 350,000.00 monies lent, together with USD 73,500.00 interest, as agreed.
- 3.2 After hearing evidence, substantially as earlier, in paragraphs 2.0 to 3.1 summarized, Phiri, J, as he then was, found the claims were established and entered judgment in favour of the respondent in the claimed amounts.

4.0 Appeal to this Court and decision

- 4.1 Dissatisfied with the judgment of the High Court, the bank appealed to this Court and by judgment dated 21st September, 2001 we upheld the judgment of the High Court and dismissed the appeal. We also observed that, there was no evidence given on the reasons why the receiver purported to repudiate the charge. In the circumstances, that the High Court judge was entitled to

invoke the principles of equity as he did, by not allowing the bank to benefit from both the loan and proceeds of the motor vehicles charged to secure the loan, which would have amounted to unjust enrichment on the part of the bank. The observations made in conclusion were that, in dealing with enforcement of the judgment, the parties should be guided by **section 99 of the Banking and Financial Services Act.**

5.0 Applications before the High Court for Enforcement of Judgment

5.1 After obtaining a final judgment of this Court in its favour, alluded to in paragraph 3.2, the respondent unsuccessfully tried to employ a number of options in an attempt to enforce the said judgment. On 27th August, 2002 the respondent sought an order to direct *Citi Bank* and the *Zambia National Commercial Bank*, to pay out monies held in the accounts of the bank, as would satisfy the judgment debt.

- 5.2 On 17th October, 2002 following upon another application, the respondent secured an order for the bank to pay the judgment debt into court. According to the record, the only effort made by the bank towards settlement of the judgment debt was payment of a paltry, USD 36,000.00 that was made on 22nd October, 2002.
- 5.3 Six years down the line, the judgment debt remained unpaid and the respondent on the 9th of June, 2009 apparently, reached out for the last straw. It took out an application against Bank of Zambia in its capacity as Liquidator of the bank in liquidation, seeking an order that it settles its fiduciary function, as provided in **section 104 (3)(a) of the Banking and Financial Services Act, Cap.387 of the Laws of Zambia.**
- 5.4 In the affidavit filed in support of the application, the respondent's contention was that, the Bank of Zambia as Liquidator of the bank, was legally obligated to ensure that the judgment debt was settled, as ordered by the court. The bank's contention was that, it verily believed the

Liquidator has deliberately denied it the fruits of its judgment by refusing to pay the judgment debt. By reason of its said failure to honour its fiduciary function, the respondent beseeched the High Court to hold the Bank of Zambia *personally* liable to settle the judgment debt.

- 5.5 There was no affidavit in opposition filed by the appellant to that application. What the appellant did, was to file a notice raising three preliminary issues.
- 5.6 The record of appeal shows, hearing of the preliminary issues came up on 13th October, 2009 before the learned High Court judge. It proceeded by way of written submissions and ruling was delivered on 18th June, 2010.
- 5.7 Upon consideration of the relevant sections, the conclusion of the learned judge on the first issue raised was that, the respondent was correct in arguing that the duties and obligations imposed on the Bank of Zambia as Liquidator by virtue of the **1995 repealed Act** were not extinguished by the **Banking and Financial Services Act**,

No. 18 of 2000, but were only extended to include 'Financial institutions'. Regarding the second and third issues, that the application was either, *statute barred* or *res judicata*, the trial judge, dismissively, referred to them as non-issues, 'since the respondent was not seeking to commence a fresh action, but was merely seeking to further its accrued rights, through obligations vested in the Bank of Zambia.' The preliminary issues were accordingly, dismissed in their entirety on the basis that, they were incompetent and unsustainable.

- 5.8 The learned judge proceeded to deal with the main application made by the respondent immediately following that finding and in the absence of an affidavit in opposition from the appellant, granted it, as one that was uncontested. The *Bank of Zambia, as Liquidator of Credit Africa Bank Limited (in Liquidation)* was ordered to settle its fiduciary function and honour the courts' final judgment rendered in favour of the respondent.

6.0 Grounds of appeal to this Court and arguments

6.1 It is that ruling, of 18th June, 2010 against which the appellant is now appealing to this Court, on three grounds stated as follows:

- 6.1.1 The court below erred in law and fact when it handed down its ruling on 18th June, 2010 without affording the applicant an opportunity to be heard, thereby infringing on the applicant's right to natural justice.**
- 6.1.2 The court below erred in law and fact when it followed the decision in the Supreme Court Judgment No. 17 of 2006, First Merchant Bank Zambia Limited (in liquidation) v The Attorney General and Al Shams Building Materials Company Limited and Jayesh Shah whose circumstances are different from the present case.**
- 6.1.3 The court below erred in law and fact when it held that the Bank of Zambia had been a party to the proceedings prior to the application that culminated in the ruling of 18th June, 2010.**

6.2 Counsel for the parties filed written heads of arguments to support their respective client's positions. On ground one, the argument advanced by counsel for the appellant was that, the learned trial judge did not hear the parties on the substantive application before him. Counsel contended that, the judge in determining the preliminary

issues raised, also determined the main application, without giving a chance to the appellant to file its affidavit in opposition or advance arguments on the main matter. It was submitted that, in proceeding as it did, the trial court flouted the *audi alteram partem* rule. The case of **China Henan International Economic Technical Cooperation v Mwange Contractors Limited¹** and **Practice Direction No.1 of 1993** were cited in support of the submission.

6.3 Grounds two and three were addressed together. The argument was that, the trial judge had treated the case in *casu* the same as that of **First Merchant Bank Zambia Limited (in Liquidation) v the Attorney General, Al Shams Building Materials Company Limited, Jayesh Shah²**. This Court there, held that, as Al Shams Building Materials Company Limited had been a depositor in the liquidated bank, Bank of Zambia as the Liquidator, had a fiduciary duty to discharge its debt.

- 6.4 Counsel argued that, the 2006 decision referred to in the preceding paragraph prescribed the manner in which the judgment debt was to be enforced. According to appellant's counsel, this Court in that case stated that, **section 99** of the **Banking and Financial Services Act**, should guide the parties, but that the said provision was later, repealed by **Act No. 18 of 2000**.
- 6.5 As a result of that repeal, counsel's further argument was that, in its format, the judgment of this court dated 26th October, 2001 could not be executed by the respondent. Firstly, this was because of the general rule regarding writs of execution and garnishee orders issued against banks in receivership, as provided under **section 99**. Secondly, that a court's discretion to allow a judgment creditor execute a judgment debt against a financial institution in receivership, was limited to only where the order or garnishee was issued prior to the bank going in receivership; and, was for an amount not exceeding K1000.00 (rebased).

- 6.6 Counsel noted that, a judgment debt cannot be enforced against a bank in liquidation and a liquidator stands in the stead of a company in liquidation. By parity of reason, the submission was that, the judgment debt cannot be enforced against the appellant, Bank of Zambia, which is a separate legal entity liable for its own debts. The case of **Stephen Mukena Kongwa v Bank of Zambia**³ was cited in aid of the submission as held that, a liquidated company's liabilities will be paid from funds realized from the sale of its assets by the liquidator, who will then pay creditors, starting with those ranked first in priority.
- 6.7 The appellant also argued that, this Court had already determined the question of liability. To now place it on the appellant, instead of the liquidated bank, would amount to re-litigation, as the matter was *res judicata*. In advancing this argument, the case of **ANZ Grindlays Bank (Zambia) Limited v Chrispin Kaona**⁴ was cited as authority.

- 6.8 In answer to those submissions, counsel for the respondent on ground one, argued that, the learned judge was entitled to treat the application as uncontested. Her contention was to the effect that, the appellant had itself to blame for neglecting to file an affidavit in opposition for a period of close to one year from when the application was filed, to the date when the ruling was rendered. Counsel referred to the **Supreme Court Practice (White book) 1999 Edition, Order 14 A/2/10** for the submission that, upon determining a question of law, a court may dismiss the action or make such order or judgment as it thinks fit.
- 6.9 On ground two, contrary to the appellant's argument that the case of **First Merchant Bank Zambia Limited (in Liquidation)**² was distinguishable on the facts, counsel for the respondent contended that, the case is infact applicable. According to counsel, the gist of the decision in that case was that the Bank of Zambia steps in the shoes of a bank in liquidation; and, not only has a

fiduciary duty, but a statutory obligation under the **Banking and Financial Services Act** to pay customers. The submission was that, the Bank of Zambia as the appellant in *casu*, was legally obligated to ensure either the return of the respondent's property or that the debt is settled as ordered by the Court.

6.10 In response to ground three, counsel for the respondent referred to our observations, in the same case, on the import of the term '*fiduciary*,' when we said:

"The authorities considered emphasized that a fiduciary relationship in relation to a banker arises in circumstances beyond the relationship of banker and customer or creditor and depositor."

6.11 The submission on the point, was that, the relationship between the respondent and the bank at the time when the cause of action arose, was that of banker and creditor; and, as such, was within the realm of a fiduciary relationship. At the time that judgment was delivered on 10th September, 1999 however, the bank in issue in this appeal was in Liquidation and in the hands of the Bank of Zambia. As the fiduciary duties imposed

by **section 104 (3) (a) of The Banking and Financial Services Act No. 28 of 1995** were not extinguished by the enactment of **Act No. 18 of 2000**, the Bank of Zambia as Liquidator, is still obligated to settle its fiduciary function to the respondent, in accordance with the ruling. We were urged to dismiss the appeal.

7.0 Consideration of the matter by this Court and decision

- 7.1 We have considered the arguments and submissions by counsel, the legal provisions we were referred to against the evidence on the record. For convenience and reasons that will become apparent later in the judgment, we propose to deal with the grounds of appeal by starting with ground three, proceed to ground one and conclude with ground two.
- 7.2 Ground three questions whether the appellant, had ever been made a party to the proceedings prior to the application made by the respondent, that culminated into the ruling of 18th June 2010, now subject of this appeal.

- 7.3 Our perusal of the record of appeal at page 30, has confirmed that the initial action in **Cause No. 1998/HP/2312** was brought by the respondent, 'Al - Shams Building Material Trading Company Limited, (suing as a firm) v Credit Africa Bank (in liquidation).' These were the only parties to the action until the respondent's application of 9th June, 2009, against the appellant, which culminated in the ruling of 18th June, 2010.
- 7.4 Granted those facts, it is abundantly clear that the appellant was never made a party to the matter until the application of 9th June, 2009 now subject of the present appeal. Our further perusal of the record reveals that no application for joinder was ever made by the respondent to join the appellant to the proceedings to which it has never been a party. This raises the corollary issue of, whether the application of 9th of June, 2009 that, purportedly, enjoined the appellant to these proceedings was competently taken before the learned trial judge, and

whether the ruling that ensued from it, was properly made as to give rise to the appeal before us.

7.5 The question that arises is whether the lower court had jurisdiction to preside over a matter where one of the parties was never joined to the action. The learned writers of **Odgers on Civil Court Actions, Practice and Precedents**, state at page 46 that, the rules of court give a plaintiff extensive powers on a writ, of joining several different parties. This is to ensure that a court exercises its jurisdiction in every cause or matter before it, so as to secure as far as possible, all matters in dispute between the parties are completely and finally determined; and all multiplicity of legal actions is avoided, the main factor being avoidance of unnecessary proceedings.

7.6 Further, **Order 14 rule 4 of the High Court Rules, Cap. 27** provides that:

“Where a defendant claims contribution, indemnity or other remedy or relief over or against any other person, he may apply to have such person made a party to the suit.” (underlining for emphasis supplied)

- 7.7 In view of the above authorities, we have no doubt that the answer to the question posed, is that the court did not have jurisdiction to hear an application nor make an order against a non-party to the proceedings and therefore, no competent appeal can arise from such application. Ground three succeeds for that reason.
- 7.8 In light of our determination on ground three, it is otiose to proceed to deal with grounds one and two. However, even if we were to deal with them on their merits, on ground one, a perusal of the High Court notes of proceedings appearing at page 128 of the record of appeal reveals that, when the matter came up for hearing on 13th October, 2009; counsel for the appellant addressed the court stating that the matter was coming up for hearing of preliminary issues raised on behalf of the appellant. He requested the court to determine the said issues, based on submissions to be filed on behalf of the parties. His counterpart, counsel for the respondent, agreed to that proposal. The matter was thereafter

adjourned by the court to facilitate for filing of submissions by the parties, which was done.

7.9 On 18th June, 2010 the court rendered its ruling dismissing the preliminary issues. The court, however, went further to consider the main application by the respondent, for an order to compel the appellant to discharge its obligation pursuant to **section 104 (3) (a) of the Banking and Financial Services Act No. 18 of 2000.**

7.10 Counsel for the respondent urged us to uphold the trial judge and relied on **RSC Order 14A/2/10**, in asserting that the court may dismiss an action or make such order or judgment as it thinks just. In this way, the action will finally be disposed of without a full trial; and, that such judgment is of the same force and effect as a judgment at the end of trial.

7.11 Suffice to note that the main **Order 14A**, reads as follows:

(1) The Court may upon the application of a party or of its own motion determine any question of law or

construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –

- (a) such question is suitable for determination without a full trial of the action, and**
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.**

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

7.12 It is clear from the above provision that, for a matter to be considered fully determined on determination of a preliminary issue, the two conditions in sub paragraphs (a) and (b) above, must be satisfied. This means, the question raised must be one that is suitable for determination without a full trial; and, such determination must fully resolve the matter pending resolution by the court.

7.13 Where such determination results in the dismissal of the preliminary issues raised, the hearing of the pending matter must necessarily proceed. In this case the preliminary issues were dismissed; and, the main application that was pending determination, seeking to

order the appellant to settle its fiduciary function pursuant **section 104 (3) of Cap. 387** was determined without a hearing. This is the reason, we do not accept the submission forcefully canvassed by learned counsel for the respondent in her submission, that on determination of preliminary issues, which he dismissed, the trial judge was entitled to exercise his discretion and determine the pending application without a hearing.

7.14 In the case of **Zinka v The Attorney-General⁵**, this Court held that the principles of natural justice are implicit in the concept of fair adjudication. That no person shall be condemned unheard; and, that parties shall be given adequate notice and opportunity to be heard. Further, in **Wilson Masauso Zulu v Avondale Housing Project⁶**, we did hold that trial courts have a duty to adjudicate every aspect of a suit between parties so as to determine every matter presented in finality. In that regard, trial courts were in **Sentor**

Motors Limited v 3 Other Companies⁷, guided in the following observations:

"It is the primary function of the court to adjudicate disputes which have been submitted for determination...The parties before us complained that their case was never tried. It is unnecessary to stress that they are entitled to a trial and to a judgment."

7.15 More to the point, is a more recent decision in **Vincent Mulevu Musukuma & Another v Major Baxter Chibanda & 2 Others⁸**, where we opined as follows:

"The issues that were raised by the defendants in the form of preliminary issues were not determined in finality. We therefore agree with Mr. Mwandenga that the trial court should have only dealt with the particular application before it and that it should not have dealt with the merits of the whole case. This amounted to a final determination of the issues which at that particular stage was premature, incompetent and accordingly a complete nullity." (underlining for emphasis supplied)

7.16 It is abundantly clear from our previous decisions cited above, that the decision on the main application in the circumstances, was undoubtedly, rendered by the learned trial judge without a hearing.

7.17 Finally, on ground two, our comments are simply that, this is not the first time this Court has had to determine issues on the relationship of the appellant,

Bank of Zambia, and banks in liquidation. There have been a number of other decisions involving the same parties previously, that is, Credit Africa Bank Zambia Limited (in liquidation); First Merchant Bank Zambia Limited (in liquidation) and Al-Shams Building Materials Limited and Jayesh Shah.

7.18 In the case of, **First Merchant Bank Zambia Limited, Attorney General v Al-Shams Materials Company Limited and Jayesh Shah²**, referred to by the appellant as having been wrongly relied upon by the trial judge, the import of **section 104 (3) of the Banking and Financial Services Act**, was considered. Our holding was that, the law imposes a statutory and fiduciary obligation on the appellant, Bank of Zambia, to liquidate a bank and return all assets and property held by Bank of Zambia to the owner, by merely stepping in the shoes of the bank in liquidation, in order to settle whatever fiduciary obligations are owed to its customers.

7.19 The respondent's arguments in its application before the trial court and before this Court, suggested that in settling its statutory and fiduciary obligations by stepping into the shoes of a bank in liquidation, the Bank of Zambia was obligated to either return the respondent bank's property or settle the judgment debt as ordered by the trial court, from its own resources.

7.20 Counsel for the respondent initially denied that her client had sought to enforce the judgment debt against the Bank of Zambia in its personal capacity. After she was pointed to her client's affidavit, at page 56 of the record of appeal, paragraph 16, which is couched in the following terms:

“.....the liquidator not having complied with its fiduciary duty, I crave the indulgence of this Honourable Court to Order that the liquidator of the defendant Bank, namely Bank of Zambia be held personally liable to settle the Judgment.”

7.21 Counsel's reaction to the above quoted paragraph was to shift goal posts. She acknowledged the prayer made, invited an order for Bank of Zambia to settle the debt from its own resources, but went on to argue that the

ruling appealed against by the appellant did not so order. Learned counsel concluded by submitting that, she was only seeking to have the appellant discharge its obligations as liquidator, in accordance with **section 104 (3) of the Banking and Financial Services Act.**

7.22 The question that arises from the position taken by counsel in the preceding paragraph, in our view, is: what constitutes the fulfilment of a statutory and fiduciary function by a liquidator as envisaged in **section 104 (3) of the Banking and Financial Services Act?** That issue, is by no means a novel issue as it has been a subject matter of this Court's previous decisions, amongst them, the cases of *Credit Africa Bank Limited (in liquidation) and Al-Shams Building Materials Trading Company Limited; First Merchant Bank Zambia Limited, Attorney-General v Al-Shams Materials Company Limited, Jayesh Shah.*

7.23 The most recent decision is **First Merchant Bank Zambia Limited (in liquidation), Attorney General and**

Al Shams Building Materials Company Limited and Jayesh Shah², where we clarified our earlier judgment, **No. 17 of 2006**, dated 28th March 2006. We, in that judgment, quoted with approval, an article by **Colin Anderson and David Morrison, ‘GST and Insolvency Practitioner Liability, Who are you?’ Revenue Law Journal, Volume II, Issue 1, January 2001**, stating that:

“no personal liability attaches to the liquidator in respect of contracts and transactions performed or entered into in her or his capacity as agent of the company. Hence, if the liquidator enters into a contract on the company’s behalf or appoints a solicitor to assist in the performance of her or his duties, the contract is made with and the liability fixes upon the company and not to the liquidator, since it is the assets of the company and not the liquidator personally that credit is given by the other party to the transaction.

This suggests that the liquidator, whilst conducting the business of the company for the purposes of winding up, is not engaging in transactions in his or her own capacity.”

7.24 Our conclusion on the issue was that, nowhere in the judgment of 28th March, 2006 was it stated that the debt obligation shifts from the 1st appellant in liquidation, to the Bank of Zambia. We clarified that “the judgment debt should be paid from the proceeds of the liquidation,

following the normal liquidation process and not from the Bank of Zambia's own personal resources or indeed the State coffers."

7.25 The result of our consideration of grounds one and two is that, they would also have succeeded on the merits. The appeal as stated earlier at paragraph 7.7 has however, been wholly determined on the basis of the success of ground three. The appellant as the successful party will have its costs of the appeal, to be taxed in default of agreement.

Appeal succeeds.

.....

E.M. HAMAUNDU
SUPREME COURT JUDGE

.....

J.K. KABUKA
SUPREME COURT JUDGE

.....

J. CHINYAMA
SUPREME COURT JUDGE