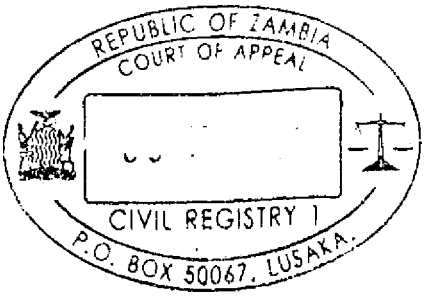
**IN THE COURT OF APPEAL OF ZAMBIA** **APPEAL NO.101/2020**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**




**BETWEEN:**

**BIMAL THAKER** **APPELLANT**

**AND**

**ACCESS FINANCE SERVICES LIMITED (In Liquidation)** **1st RESPONDENT**

**ACCESS LEASING LIMITED (In Liquidation)** **2nd RESPONDENT**

**THE ATTORNEY GENERAL** **3rd RESPONDENT**

**CORAM : Chashi, Sichinga and Banda-Bobo, JJA**

**ON : 18TH May and 5th November 2021**

*For the Appellant* : *M. Z. Mwandenga, Messrs. MZ Mwandenga & Company*

*For the 1st and 2nd Respondents* : *H. A. Chizu, Messrs. Chanda Chizu & Associates*

*For the 3rd Respondent* : *N. K. Lumbwe (Mrs), Senior State Advocate, Attorney General's Chambers*

# JUDGMENT

**CHASHI, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. ***African Banking Corporation Limited v Mubende Country Lodge Limited - SCZ Appeal No. 116 of 2016***

2. ***Indeni Petroleum Refinery Company Limited v Kafco Oil Limited, Andrew Bungoni, Silas Mumba and Emmanuel Shikaputo – SCZ Judgment No. 29 of 2017***

3. ***Sam Chisulo V Mazzonites Limited – CAZ Appeal No. 67 of 2019***

4. ***John Sangwa v Sunday Bwalya Nkonde SC (2018/HP/1029) (2018) ZMHC 284***

5. ***JCN Holdings Limited v Development Bank of Zambia (2013) 3 ZR, 299***

6. ***Antonio Ventriglia and Manuela Ventriglia v Finsbury Investments Limited – SCZ Appeal No. 02 of 2019***

**Legislation referred to:**

1. ***The Corporate Insolvency Act No. 9 of 2017***

2. ***The Banking and Financial Services Act No. 7 of 2017***

**Rules referred to:**

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

2. ***The High Court Rules, Chapter 27 of the Laws of Zambia***

## 1.0 INTRODUCTION

1.1 This appeal emanates from the Ruling of Honourable Lady Justice Dr. W.S. Mwenda, delivered on 7th April,

2020. In the said Ruling, the Judge found that the application by the 1st and 2nd Respondents to set aside writ of summons for irregularity brought under Order 14A of **The Rules of the Supreme Court (RSC)**[1] was competently before her.

1.2 The Judge then went on to set aside the writ of summons on the basis that the Plaintiff did not seek leave of court before commencing an action against the 1st and 2nd Respondents which were in liquidation in accordance with section 66 and 98(c) of **The Corporate Insolvency Act (CIA).**[1]

## 2.0 BACKGROUND

2.1 The brief facts leading to this appeal are that, the 1st and 2nd Respondents were put on compulsory liquidation by Bank of Zambia (BOZ) sometime in 2003 under the powers it enjoyed under the then **Banking and Financial Services Act, Chapter 387 of the Laws of Zambia**, which has since been repealed and replaced by **The Banking and Financial Services Act (BFSA).**[2]

2.2 On 5th January, 2018, the Appellant brought an action against the Respondents by way of writ of summons claiming the sum of K6,198,000.00 (unrebased) being the amount in credit held by the 1st and 2nd Respondents.

2.3 The 1st and 2nd Respondents entered a conditional memorandum of appearance on 14th November, 2018 and the 3rd Respondent did the same on 21st November, 2018. On 4th December, 2018, the 1st and 2nd Respondents filed a summons and affidavit to set aside the writ of summons for irregularity pursuant to Order 14A **RSC**[1] while the 3rd Respondent filed their summons and affidavit for misjoinder on 6th December, 2018. Both applications were opposed by the Appellant.

## 3.0 THE COURT BELOW

3.1 After considering the pleadings and the arguments, the first issue the court considered was whether the application by the 1st and 2nd Respondents was competently before it, having been brought under Order 14A rule 1 **RSC**[1].

3.2 The court found that by Order 14A rule 1 **RSC[1]**, a party could raise a preliminary issue for determination of any question of law or construction of document. That in the present case, the 1st and 2nd Respondents sought the court's determination on two questions, namely; whether leave of court was required before the action was commenced by the Appellant and secondly, whether or not the action was statute barred. The learned Judge, opined that these were questions of law and fell within the ambit of Order 14A **RSC[1]**.

3.3 The Judge dismissed the argument by Counsel for the Appellant that Order 14A **RSC[1]** requires a party to file a notice of intention to defend before it can be invoked. She took the view that, for applications under Order 14A, once service of writ of summons and statement of claim has been effected on the defendant, the defendant can either enter appearance and file a defence or if the defendant has an issue with the writ of summons, he can enter a conditional memorandum of appearance and file

the necessary application to set aside the writ for irregularity.

3.4 The Judge opined that, while such an application can be made under Order 11 rule 1(4) **High Court Rules (HCR)**[2], there is nothing to prevent a defendant from proceeding under Order 14A **RSC**[1] after entering a conditional memorandum of appearance, where there are questions of law for determination. The court therefore, found that the 1st and 2nd Respondents' application was properly before it.

3.5 The second issue was whether the Appellant needed leave of the court to commence proceedings against the 1st and 2nd Respondents, which Companies were under liquidation. The court found that, the provisions of the **CIA**[1] were applicable to the Respondents and that whether a winding up is compulsory or voluntary, it is a requirement for leave of court to be obtained in accordance with sections 66 and 98(c) of **CIA.**[1]

3.6 In view of the court's finding that no leave was obtained, the writ of summons was set aside.

## 4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the decision of the lower court, the Appellant appealed to this Court advancing six (6) grounds of appeal, couched as follows:

1. **The learned Judge erred in law and fact when she found that the 1st and 2nd Respondents' application was properly brought pursuant to Order 14A of the Rules of the Supreme Court (White Book) 1999 Edition.**
2. **The Respondent having purportedly made an application pursuant to Order 14A Rule 1 of the Rules of the Supreme Court, 1965 (White Book 1999 Edition) absent questions for determination in the summons relating to the application, the learned trial Judge erred in law and fact when on her own volition she framed the issues for determination based on issues raised by the Respondents after considering the parties' submissions and arguments and proceeded to answer the issues so framed.**

3. **The learned trial Judge misdirected herself when she delayed and inordinately so, the delivery of the Ruling on the 1st and 2nd Respondents' application.**
4. **Having inordinately delayed in delivering the ruling in connection with the 1st and 2nd Respondents' application, the learned trial Judge misdirected herself when she failed or neglected to deliver a ruling on the application by the 3rd Respondent which was heard on the same day as the application by the 1st and 2nd Respondents.**
5. **The learned trial Judge erred in law and fact when she concluded that the winding up of the 1st and 2nd Respondents was premised on their insolvency.**
6. **The learned trial Judge erred in law and fact when she held that the Appellant should have sought leave of the court pursuant to section 66 and 98(2) of the Corporate Insolvency Act of**

**2017 before commencing the proceedings in the court below.**

## 5.0 ARGUMENTS IN SUPPORT

5.1 As indicated at paragraph 4.1, the Appellant has advanced six grounds of appeal. However, in the view that we have taken, which will become apparent in the course of this Judgment, we will only deal with ground one of the appeal which raises issues with an immediate bearing on the outcome of this appeal.

5.2 In support of ground one, Mr. Mwandenga, Counsel for the Appellant, relied on the Appellant's heads of argument filed on 19th June, 2020 and briefly augmented the same with oral submissions.

5.3 Counsel submitted that, the Appellant commenced an action against the Respondents by way of writ of summons on 5th January, 2018. The 1st and 2nd Respondents reacted by filing a conditional memorandum of appearance on 14th November, 2018 indicating that they would be filing an application to set aside the writ for irregularity within 14 days. The conditional

memorandum of appearance was signed by the Deputy Registrar (DR) on 20th November, 2018. And on 4th December, 2018, the Respondents filed their application to set aside the writ for irregularity pursuant to Order 14A Rule 1 **RSC.**[1]

5.4 According to Counsel, the question, therefore, was whether the 14 days started counting from the date of filling the conditional memorandum of appearance or when it was endorsed by the DR. In response to this question, Counsel referred us to Order 11 Rule 1(4) **HCR**[2] and submitted that the requirement for the DR's endorsement on the conditional memorandum of appearance was not supported by any provision of the law. As such, the 14 days started running from the date the conditional memorandum of appearance is filed into court.

5.5 That, therefore, the 1st and 2nd Respondents ought to have filed the application to set aside the writ for irregularity on or before 27th November, 2018 and a failure to do so rendered the conditional memorandum

of appearance "unconditional" and it ought to have been accompanied by a defence.

5.6 It was further argued that, since the Respondents were seeking to set aside the writ for irregularity, the application ought to have been made under Order 11 Rule 1(4) **HCR**[2] and not Order 14A **RSC.**[1] According to Counsel, Order 14A does not clothe the court with the power to strike out a writ for irregularity. In support thereof, Counsel cited the case of **African Banking Corporation Limited v Mubende Country Lodge Limited.**[1]

5.7 It was further pointed out that, unlike Order 11 Rule 1(4) **HCR,**[2] which requires the filing of a conditional memorandum of appearance, Order 14A **RSC**[1] can only be invoked after the filing of a notice of intention to defend.

That, *in casu*, after entering the conditional memorandum of appearance and notwithstanding that the 14 days within which to make the application had elapsed, the Respondents proceeded to file their

application under Order 14A Rule 1 **RSC**[1] as opposed to Order 11 Rule 1(4) **HCR**.[2]

5.8 Relying on the **Mubende Case**[1], Counsel submitted that, an intention to defend is a pre-requisite under Order 14A **RSC**[1] and it is evidenced by the filing of a memorandum of appearance and defence. That, the mere filing of a conditional memorandum of appearance does not amount to a notice of intention to defend. We were referred to Order 11 Rule 1(1) and (2) of **HCR**.[2]

5.9 Counsel submitted that, the failure to file a notice of intention to defend under Order 14A is detrimental. In support of this position, Counsel cited the case of **Indeni Petroleum Refinery Company Limited v Kafco Oil Limited, Andrew Bungoni, Silas Mumba and Emmanuel Shikaputo.**[2]

5.10 Counsel submitted that, the requirements for invoking Order 14A were not met and as such, the application before the lower court was incompetent and should not have been entertained. According to Counsel, the present

case is on all fours with the **Mubende case**[1] and it should be decided in a similar fashion.

## 6.0 1st AND 2ND RESPONDENTS ARGUMENTS IN OPPOSITION

6.1 Mr. Chizu, on behalf of the 1st and 2nd Respondents relied on the written heads of argument filed on 27th July, 2020. Counsel supported the lower court's finding that the 1st and 2nd Respondents' application was competently before it.

6.2 In response to the Appellant's argument that the Respondents' application to set aside writ was made after the 14 days of filing the conditional memorandum of appearance had expired, it was submitted that, it was being wrongly raised. According to Counsel, upon receipt of the Respondents' application, the Appellant, ought to have raised the issue by way of a preliminary issue in order for it to be determined first before the main application. That instead, the Appellant filed a detailed affidavit opposing the main application.

That, by proceeding in this manner, the Appellants waived their rights to raise any issue with regards to the manner the application had been made.

6.3 With regards to when the 14 days starts running on a conditional memorandum of appearance, Counsel submitted that time starts running when the DR endorses the conditional memorandum of appearance. In support thereof, Counsel referred to our decision in the case of **Sam Chisulo v Mazzonites Limited.**[3]

6.4 It was further argued that, Order 14A **RSC**[1] is a general provision dealing with questions of law and construction of documents. That the need to seek leave before commencing an action against a company in liquidation is a question of law which can properly be determined under Order 14A **RSC.**[1] It was submitted that Order 11 Rule 1(4) **HCR**[2] merely fortifies the Respondents' application that the court had no jurisdiction to adjudicate over the matter in the form it was presented.

6.5 Counsel further contended that, while he agreed with the principle espoused in the **Mubende case**, the setting

aside of the writ has the same effect under Order 14A **RSC**[1] which is dismissal of the case for failure to obtain leave of the court. That it is a serious irregularity and amounts to noncompliance with the court rules and the law. And that it is an irregularity that goes to the root of the case, as it touches on the jurisdiction of the court.

## 7.0 3RD RESPONDENTS ARGUMENTS IN OPPOSITION

7.1 Mrs. Lumbwe, Counsel for the 3rd Respondent relied on the filed heads of argument dated 22nd July, 2020. In response to ground one, Counsel conceded that the 1st and 2nd Respondents' application to set aside the writ for irregularity was incompetently before the court and that the requirements of Order 14A **RSC**[1] were not met. In support thereof, Counsel relied on the **Mubende case**[1] and **John Sangwa v Sunday Bwalya Nkonde.**[4]

## 8.0 ARGUMENTS IN REPLY TO 1ST AND 2ND RESPONDENTS ARGUMENTS IN OPPOSITION

8.1 In response to the 1st and 2nd Respondents reliance on the **Sam Chisulo case**[3], Counsel submitted that, he disagreed with our decision in that case, for the reason

that, the manner of entering a memorandum of appearance or conditional memorandum of appearance is provided for under Order 11 Rule 1 (4) **HCR[2]** as read with Practice Direction No. 4 of 1977 and that they do not provide for the requirement of the DR to endorse the memorandum of appearance or the conditional memorandum of appearance. That to suggest otherwise, would essentially be extending the time within which a party ought to enter appearance, thereby contravening the provisions of the law.

8.2 It was argued that the practice of the DR endorsing the conditional memorandum of appearance is a practice that has developed without any backing of the law. That even assuming that time started running from the date the DR endorsed the conditional memorandum of appearance which is 20th November, 2018, the 14 days elapsed on 3rd December, 2018 and not 4th December, 2018 when the application was made.

8.3 With Regard to the argument that the Appellant did not raise a preliminary objection regarding the manner in

which the Respondents' application was made, Counsel submitted that the said objections were raised and considered by the lower court, which decision is subject of ground one of the appeal.

## 9.0 DECISION OF THIS COURT

9.1 We have considered the record of appeal, the impugned Ruling and the submissions by Counsel.

9.2 As earlier indicated, we will only be dealing with ground one of the appeal, as it raises issues of jurisdiction. For that reason, we agree with the learned Judge in the court below, that the issue that falls for determination is whether or not the 1st and 2nd Respondents' application was properly before the court.

9.3 The Appellant's argument is that, the 1st and 2nd Respondents having filed a conditional memorandum of appearance on 14th November, 2018, had 14 days within which to make an application to set aside the writ of summons for irregularity. That, the 14 days started running from the date the conditional memorandum of appearance was filed into court and as such, the

application ought to have been made on or before 27th November, 2018.

9.4 The Respondents only made their application on 4th December, 2018, after the 14 days period had elapsed. That, therefore, the Respondents ought to have filed in their defence. That, in the absence of a defence, the Respondents could not invoke the provisions of Order 14A **RSC.**[1] Thus, the Respondents' application was incompetently before the court.

9.5 The Respondents on the other hand, argued that the lower court could not be faulted when it found that the Respondents' application was competently before it. Relying on the **Sam Chisulo case**[3], it was submitted that, the 14 days on the conditional memorandum of appearance started running when the DR endorsed the conditional appearance on 20th November, 2018. As such, they were well within the permitted period to make their application to set aside the writ of summons.

9.6 In order to determine the issue we have identified in paragraph 9.2, we will firstly deal with the question of

when the 14 days period within which to make an application to set aside a writ starts running. Whether it is from the time the conditional memorandum of appearance is filed or when it is endorsed by the DR?

9.7 To better answer this question, we had recourse to the High Court Rules, both the former and the current and we also looked at the practice direction referred to by Counsel for the Appellant. We also considered our decision in the **Sam Chisulo case**,[3] where we dealt with a similar issue. In that case, we held that:

> *"Legal Practitioners have developed a practice of inscribing on the left margin of the Memorandum of Appearance that they are entering a conditional appearance and that they will make the intended application within 14 days and they include a provision for the conditional appearance to be endorsed by the Deputy Registrar and we take judicial notice of the usual practice.*
>
> *In our view, the provision for the Deputy Registrar to endorse a conditional memorandum of appearance is*

*not for decorative purposes. The filing of the conditional mappearance is therefore the initial part of the process which is only given effect after being considered and endorsed by the Deputy Registrars. In our view, the requirement for the endorsement is that it puts the Court and the Plaintiff on notice that an application will be made to challenge either the irregularity of the writ of summons or the jurisdiction of the Court, the outcome of which may affect the action from the onset. Therefore, the endorsement by the Deputy Registrar is what gives effect to the conditional memorandum of appearance.*

*The 14-day period which was endorsed on the conditional memorandum of appearance, in casu, therefore only started running after it was endorsed by the Deputy Registrar..."*

9.8 Based on the foregoing, while we do agree with Counsel for the Appellant that there is currently no provision of the law mandating the DR to sign the conditional memorandum of appearance, we hold the view that this

is a course of conduct that has developed over time. We believe it is a practice that has been adopted and accepted by legal practitioners as binding and it has in so doing, attained the force of law. As we stated in the **Sam Chisulo case**,[3] the courts have equally taken judicial notice of this practice and its binding effect.

9.9 We, therefore, maintain our position in the **Sam Chisulo case** and see no reason why we should now depart from it. Thus, *in casu*, time started running when the DR endorsed the conditional memorandum of appearance on the 20th November, 2018. The Respondents' therefore, had until 4th December, 2018 within which to make their application. It is clear from the record that the Respondents, made their application on 4th December, 2018, as such, they were within the permitted period to make the application to set aside the writ for irregularity.

9.10 That, notwithstanding, the Respondents proceeded to file their application under Order 14A **RSC**[1] as opposed to Order 11 Rule 1 (4) **HCR** which provides for the filing of a

conditional memorandum of appearance with a view to setting aside a writ.

9.11 It would appear that the Respondents were oblivious to the requirements that must be satisfied before invoking Order 14A **RSC.**[1] In the **Mubende case**[1], the Supreme Court discussed Order 14A and gave guidance on the conditions to be met before it can be invoked. It was held as follows:

> *"In the view that we take what constitutes a notice of intention to defend, in the context of our rules, is the filing of a memorandum of appearance which is accompanied by a defence. It, therefore, follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under Order 14A, RSC. The record shows, as we alluded to earlier, that contrary to the mandatory requirements of Order 11, rule 1 of the High Court rules, the appellant did not file a memorandum of appearance and a defence before invoking Order 14A, RSC. Consequently, we cannot fault the trial*

*judge in finding that the conditions favourable to invoking Order 14A, RSC were not present.*

*...The filing of a conditional memorandum of appearance without a defence is only applicable in circumstances where a defendant wishes to contest the validity of proceedings with a view to applying to set aside the writ. This is governed by Order 11, rule 4 of the rules of the High Court...*

*It is very clear from Order 11, rule 4 that other than what is envisaged therein, a conditional appearance can never be extended or over stretched to constitute a notice of intention to defend in the context of an application under Order 14A, RSC which is intended to finally determine a matter without a full trial of the action."*

9.12 In light of the forgoing, it is clear that by proceeding in the manner they did, the Respondents overlooked a vital step of procedure and in the process shot themselves in the foot. As rightly pointed out by Counsel for the Appellant, the Respondents who sought to set aside the

writ for irregularity, ought to have made their application under Order 11 Rule (1) 4 **HCR**[2]. It is only in such instances that the filing of a conditional memorandum of appearance without a defence is applicable. Thus, the Respondents application should not have been allowed without them filing a defence.

9.13 It follows, therefore, that the failure by the Respondents to meet the conditions favourable to invoking Order 14A **RSC**[1] rendered the application incompetent and consequently, the court was devoid of jurisdiction.

9.14 In that respect, all the orders which were given by the court were unlawful and we hereby set them aside. This is in keeping with the holding in the case of **JCN Holdings Limited v Development Bank of Zambia**[7], where the Supreme Court held that:

> *"It is clear from the Chikuta and New Plast Industries Cases that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter.*

*Affirming our decisions in the Chikuta and New Plast Industries Cases, we hold that since this matter was improperly before Mutuna, J, he had no jurisdiction to hear and determine it. Also, he had no jurisdiction to make any order or grant any remedy. Consequently, the judgment and the ruling he delivered, which are the subject of this appeal, are null and void."*

9.15 Further in the case of **Antonio Ventriglia and Manuela Ventriglia v Finsbury Investments Limited**[8] the Supreme Court dealt with another jurisdiction issue and held that out of nothing, comes nothing and that he gives nothing, who has nothing.

9.16 Based on the foregoing, the lower court had no jurisdiction to hear and determine the Respondents' application as it was improperly before the court. We find merit in ground one of the appeal and allow the appeal on that basis. We, accordingly set aside the Ruling of the lower court. In view of the position we have taken, it would be otiose for us to consider the other grounds of appeal.

## 10.0 CONCLUSION

10.1 The net effect of our decision is that, the Appeal succeeds and we Order that the matter be sent back to the High Court for orders for direction before another Judge. Costs to the Appellant, to be taxed in default of agreement.

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**J. CHASHI**
**COURT OF APPEAL JUDGE**

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**D.L.Y. SICHINGA, SC**
**COURT OF APPEAL JUDGE**

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