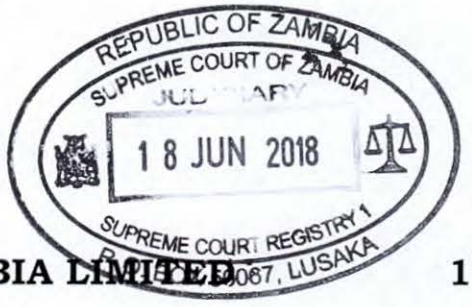
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 144/2015**

HOLDEN AT LUSAKA



(Civil Jurisdiction)

BETWEEN:

FINANCE BANK ZAMBIA LIMITED	**1ST APPELLANT**
LEASING FINANCE COMPANY LIMITED	**2ND APPELLANT**
FINSBURY INVESTMENTS LIMITED	**3RD APPELLANT**
PETER KANAGANAYAM	**4TH APPELLANT**
RAJAN MAHTANI	**5TH APPELLANT**

AND

ZAMBEZI PORTLAND CEMENT LIMITED	**RESPONDENT**

Coram: Muyovwe, Wood and Chinyama, JJS.

On 8th May, 2018 and 29th May, 2018.

For the Appellants: *Mr. J. Sangwa SC – Messrs Simeza Sangwa & Associates*

For the Respondent: *Mr. S. Mambwe – Messrs Mambwe Siwila and Lisimba Advocates*

JUDGMENT

Wood, JS, delivered the Judgment of the Court.

Cases Referred to:

(1) Bellamano v Ligure Lombarda (1967) Z.R. 267

(2) *International Trades Crystals Societe Anonyme v Northern Minerals (Zambia) Limited (1985) Z.R. 27.*

(3) *Remmy Kabanda Mushota v Law Association of Zambia (1985) Z.R. 146*

(4) *Ituna Partners v Zambia Open University Limited Supreme Court Appeal No. 117 of 2003.*

(5) *National Airports Corporation Limited v Reggie Ephraim Zimba and Savior Konie (2000) Z.R. 154.*

(6) *Zambia Bata Shoe Company v Vin-Mas Limited (1993/1994) Z.R. 136*

Legislation referred to:

(1) *Sections 23 and 24 of the Companies Act Cap 388*

This is an appeal against a ruling of the High Court dismissing an application to set aside a writ on the ground that the writ was issued without the authority of the respondent.

The third appellant is a shareholder in the respondent while the 4th and 5th appellants are directors of the respondent. An action was commenced by the respondent against the 2nd appellant under cause number 2015/HN/115 and another action was commenced by the respondent against the 3rd, 4th and 5th appellants under cause number 2015/HN/091. On 29th June, 2015 cause numbers 2015/HN/091 and 2015/HN/115 were consolidated under cause number 2015/HN/089 which gave rise to this appeal. The issue in

all these causes was that the respondent had issued writs without appropriate authority. It is necessary to point out early in this judgment that the parties to this appeal including other parties who are not parties to this appeal are embroiled in other litigation relating to the shareholding and control of the respondent. We are however here concerned with whether or not the various writs were issued without the authority of the respondent in the court below.

On 2nd July, 2015, the respondent issued a consolidated writ of summons against the appellants claiming the following:

(i) *A declaration that the respondent was entitled to the money in the 2nd appellant's account held at First Alliance Bank (Z) Limited.*

(ii) *An order of mandatory injunction directing the 2nd appellant to transfer the respondent's money from its bank account held at First Alliance Bank (Z) Limited to its account held at First Alliance Bank (Z) Limited.*

(iii) *Damages from the 2nd appellant for unlawful retention of the respondent's money.*

(iv) *Damages for loss of business for the 1st appellant's failure to honour the respondent's cheques.*

(v) *A declaration that that the 1st appellant as a financial institution is under a fiduciary duty to honour cheques duly issued.*

(vi) *An order of mandatory injunction directing the 1st appellant to transfer the respondent's money from its bank accounts at the 1st appellant's bank to its accounts at First Alliance Bank Ndola.*

(vii) An account of all sums of money received by the 3rd, 4th and 5th appellants for the period they illegally and/or wrongfully managed the respondent company.

(viii) The sums of K185,204,224.76 and $30,020, 218.09 from the 3rd , 4th and 5th appellants being the total amount in dollars that ought not to have been paid out of the income of the respondent.

(ix) Interest on the sums claimed at such interest rates as the court may deem fit.

(x) Any other relief.

(xi) Costs.

The writs were challenged prior to consolidation and the court below proceeded on the basis of the earlier applications challenging the writs for being issued without authority. The affidavit in support which was sworn by the 5th appellant stated that the 3rd appellant was a shareholder of the respondent and that he was the chairman of the respondent while the 4th appellant was its chief executive officer. The 5th appellant further stated in his affidavit in support that no board resolution had been passed appointing Messrs Muya & Company as advocates for the respondent company and authorizing them to commence these proceedings on behalf of the respondent. The only resolution of the respondent appointing lawyers related to the appointment of Messrs Simeza Sangwa &

Associates and Mulenga Mundashi, Kasonde & Associates as exclusive advocates for the respondent.

The affidavit in opposition was sworn by Daniele Ventriglia who stated that the transfer of shares from her parents into Ital Terrazo was fraudulently done by the 3rd appellant as such they did not own any such shares in the respondent. Further, the shares in the respondent could only be transferred upon payment of property transfer tax and the vendor of the same acknowledging receipt of the purchase price.

The other affidavit in opposition sworn by Antonio Ventriglia on 11th May, 2015 disputed that the 5th appellant was the chairman of the respondent's board and that he assumed his position using forged share transfer forms and scanned signatures from other documents. In addition, Professional Services which claimed to be company secretaries for the respondent who issued the share transfer forms was but a conduit for the 5th appellant as it was owned by him and could not independently discharge its duties hence its preparation of resolutions favouring its owners. As such, the list of directors on the resolution was wrong and illegal as the

party claiming to be a shareholder was a disputed shareholder with an active High Court action against it for fraud. In any event, Antonio Ventriglia was out of the country at the time of such appointment and before he was deported, the board of directors was different. The issue was before court and an injunction was in place to restrain any person other than Antonio Ventriglia, his wife and children from managing the affairs of the respondent. He therefore did not need a board resolution to appoint lawyers or to contract for goods and services for the running of the respondent company. He had always been the managing director of the respondent vested with such powers to appoint lawyers. When the 5th appellant through the 3rd appellant took over the respondent's operations upon his deportation in 2012, they held a wrongful and or illegal meeting appointing a new chief executive officer and financial controller to fill the management vacancies pending the confirmation of his deportation. Since the deportation had been quashed and he was back, the management of the respondent reverted to the status quo.

The learned judge in the court below reviewed four seminal decisions relating to applications for stay of actions commenced

without authority. The four cases referred to by the learned judge were *Bellamano v Ligure Lombarda*[1]; *International Trades Crystals Societe Anonyme v Northern Minerals (Zambia) Limited*[2]; *Remmy Kabanda Mushota v Law Association of Zambia*[3] and *Ituna Partners v Zambia Open University Limited*[4]. These decisions point to the fact that the issuing of a writ without authority is an abuse of the court's process and the appropriate remedy is an application to strike out the writ. Thereupon, the action may be stayed or dismissed or judgment may be entered. It is significant to point out early in this judgment that three of these decisions which laid down the common law position were all made prior to the enactment of the Companies Act in 1994, a point we shall return to later in our judgment. The fourth decision which is the case of *Ituna Partners v Zambia Open University Limited* did not make any reference to the 1994 Companies Act even though judgment was delivered on 16th June, 2014. It however confirmed the common law position on the need for authority to issue a writ as stated in the earlier three decisions.

The learned judge also considered the decision of Justice Chashi in cause number 2008/HPC/0366 in which he granted an

ex-parte order of injunction on 28th May, 2015 restraining Finsbury Investments Limited and its agents, from continuing to purport to act as shareholders by appointing board members of Zambezi Portland Cement Limited and/or convening any meeting of Zambezi Portland Cement Limited and from taking any course of action of any nature whatsoever as shareholder of Zambezi Portland Cement Limited. The ex-parte injunction was confirmed after an inter-partes hearing on 9th July, 2015. Arising out of this inter-partes hearing which confirmed the ex-parte injunction, the learned judge found substance in the respondent's submission that the board of directors was moribund. The learned judge further found that the evidence on record was that it was Mr. Ventriglia who was in charge of directing the management of the affairs of the respondent to the exclusion of the 3rd, 4th and 5th appellants as well as the other directors on the 5th appellant's list. Having found as such, the learned judge then asked who in the light of the evidence could really initiate a court action in the name of and on behalf of the respondent. He further asked who could take steps to have court actions against the respondent defended. He concluded that these two questions went to the root of protecting the company's interests

and, in turn, those of its rightful shareholders. He then proceeded to distinguish the cases of *Bellamano v Ligure Lombarda; International Trades Crystals Societe Anonyme v Northern Minerals (Zambia) Limited; Remmy Kabanda Mushota v Law Association of Zambia* and *Ituna Partners v Zambia Open University* with this case. Although he accepted the argument that the law requires that for a company to commence legal proceedings it has to pass a resolution to that effect he questioned who could have passed a resolution in the instant case.

The learned judge then took time to examine the concepts of a de facto director and a de jure director and asked himself what would happen if the respondent was sued for a colossal sum of money and Mr. Ventriglia or any other person on the ground purporting to manage the affairs of the company were to be held legally handicapped to give instructions to lawyers to defend the court action. In addition to that, the 5th appellant and his fellow directors were under restraint by court order from performing the duties of directors, including taking or defending court actions. The inevitable result he concluded was that there would be a default judgment against the respondent and execution against its assets.

In his considered opinion, that would not have been in the best interests of the company or its legitimate shareholders. He therefore concluded that it was not in the best interests of justice to dismiss this action on the ground that it was an abuse of the process of the court or on any of the grounds alleged by the appellants. He also refused to stay the proceedings as it was not known when the disputes between the parties would be resolved.

The appellants have now appealed against the ruling raising seven grounds of appeal. The first ground of appeal is that the court below misdirected itself on a point of law and fact by holding, that in the light of the ex-parte order of 28th May, 2015 and the ruling of 9th July, 2015 by Mr. Justice Chashi, the board of directors of the respondent company as claimed by Dr. Mahtani was moribund. The appellants have argued that there was no evidence in the court below to support that conclusion as they contended that the injunction had nothing to do with the board of directors of the respondent. The same was against the 3rd appellant in its capacity as shareholder of the respondent. The order sought to restrain the 3rd appellant from exercising its powers as a shareholder in the appointment of the members of the board of

directors of the respondent. It had nothing to do with the board or any of its members. There was therefore no legal or factual basis for contending that the board of directors was dead. They argued that the board of directors was in fact in place and was reflected in the company records, which are in accord with what is kept by the Patents and Companies Registration Agency (PACRA).

We have considered this ground of appeal and agree with the argument that the wording of the order of injunction had nothing to do with the board of directors of the respondent. The order reads as follows:

> *"IT IS HEREBY ORDERED that the plaintiff and its agents namely Dr. R. L. Mahtani, Mr. D. P. K. Kanaganayagam, Mrs. J. Craven, Mrs I.S. Wamulume, Mr. D. Tembo and Bishop J. Mambo or whomsoever acting on its behalf be and are hereby restrained from continuing to purport to act as shareholder by appointing board members in Zambezi Portland Cement Limited (ZPC) and/or convening any meeting of ZPC and and/or of from taking any course of action of any nature whatsoever as shareholder of ZPC until final determination of this matter or further order of the Court."*

It can be seen from the order as drafted that it makes reference to shareholders appointing board members. As at 8th April, 2015 the Patents and Companies Registration Agency showed that the 4th and 5th appellants were appearing as registered

directors although there is no doubt that the veracity of this document is in serious dispute among the parties in other litigation. The point being made by the appellants which we agree with, is that even though there is a serious dispute over these appointments they should nevertheless be accepted as such until such time that they are reversed by a court order. There was no factual or legal basis for contending that the board of directors of the respondent was dead.

The argument by Mr. Mambwe in respect of the first ground of appeal that the injunction restrains the 3rd appellant and its agents from continuing to purport to act as shareholder by appointing board members of the respondent does not in any way cover the appellants as there was already a board in place even though its legitimacy is disputed. No board members were being appointed. As such the appellants were not affected by the injunction.

The second ground of appeal is that the Court below misdirected itself on a point of law by holding that Mr. Antonio Ventriglia was in charge of directing the management of the affairs of the respondent to the exclusion of the 3rd, 4th and 5th appellants.

The appellants have argued that there was no evidence presented before court to support this conclusion. In addition, this was not the issue before court. They have argued that the Court below was required to determine whether the action against the appellant was commenced with the authority of the respondent. They argued that even if it was accepted that Mr. Antonio Ventriglia was directing the management of the affairs of the respondent that was no substitute for a resolution of the company authorizing the commencement of the action.

We have considered the appellant's argument in connection with the second ground of appeal. Again we agree with the appellants that no evidence was presented to the court to support the holding that Mr. Antonio Ventriglia was in charge of directing the management of the affairs of the respondent to the exclusion of the 3rd, 4th and 5th appellants. In addition, this was not the issue before the Court below. We also agree that prior to the enactment of the Companies Act Cap 388 of the Laws of Zambia in 1994, even assuming that Mr. Ventriglia was directing the management of the affairs of the respondent that was no substitute for a resolution of the company authorizing the commencement of the action. We do

not accept Mr. Mambwe's argument in respect of this ground that there was evidence on record that Mr. Ventriglia was in charge of directing the management of the affairs of the respondent because there is no evidence to that effect on the record.

Although the articles of the respondent have not been exhibited, the complaint stemming from them is that there was no authority to issue the writ. Under section 23 of the Companies Act no acts of a company are invalidated on the grounds that the acts are contrary to the company's articles or to the Act itself.

There is no doubt that this section has effectively removed the argument that all acts of a company need to be valid for them to be complied with if the only reason being advanced is that they are contrary to the company's articles or the Act. We do not therefore accept the argument by State Counsel Sangwa that a resolution of a company should be considered separately from the articles of a company or the Companies Act because the passing of a company resolution does constitute an act of the company in terms of section 23. Further, section 24 has removed the presumption of constructive notice when dealing with third parties.

Section 24 stipulates as follows:

> *"No person dealing with a company shall be affected by, or presumed to have notice or knowledge of, the contents of a document concerning the company by reason only that the document has been lodged with the Registrar or is held by the company available for inspection."*

When these two sections are read together it becomes apparent that the Companies Act has changed the common law position on commencement of actions without authority. It is no longer a valid argument to argue that a writ has been issued without authority because section 23 does not make such an action invalid. There is no evidence from the record of appeal which shows that Mr. Muya was aware that he had not been authorized by the respondent to issue the writ. It follows that the writ issued by Messrs Muya and Company is valid and that Mr. Muya could not be presumed to have had notice or knowledge of the fact that no resolution had been passed appointing him to act as advocate for the respondent. It also follows that while Order 18 rule 19 (1) (d) of the Rules of the Supreme Court still applies to other applications relating to an abuse of the process of the Court it can no longer be used as a basis for making an application in relation to a writ issued without authority. In *National Airports Corporation Limited v*

Reggie Ephraim Zimba and Savior Konie[5] we held that an outsider dealing with a company cannot be concerned with an alleged want of authority when dealing with a representative of appropriate authority or standing for the class or type of transaction. At page 156 of the *Reggie Ephraim Zimba case* we held that:

> *"The principle in those cases is now confirmed by our Companies Act so that an outsider dealing with a company cannot be concerned with any alleged want of authority when dealing with a representative of appropriate authority or standing for the class or type of transaction."*

The third and fourth grounds of appeal attack the manner in which the learned judge attempted to resolve the issue before him by asking himself questions that were not raised by any of the parties. The issue before court was simply whether the action in the name of the company was commenced with the authority of the company. This is a valid argument as quite clearly none of the parties had raised the issue of who could rightly initiate court action in the name of and on behalf of the respondent or who could take steps to have the court actions against the respondent defended. We therefore allow these two grounds of appeal as there was no need for the learned judge to raise these questions on his own and reject Mr. Mambwe's argument in respect of these two

grounds that the learned Judge was at liberty to ask himself and answer questions that were really not before him in order to justify his ruling.

The fifth ground of appeal is that while the court below acknowledged the fact that the law requires that for a company to commence legal proceedings it has to pass a resolution to that effect, misdirected itself on a point of law, in the absence of a resolution by the respondent to commence the proceedings in the Court below, by refusing to dismiss or stay the action.

The argument in support of this ground of appeal is that the court below misdirected itself when it asked itself the question which board could have passed such a resolution to commence proceedings in the instant case. State Counsel Sangwa argued that it was not the contention in this case that such a resolution had indeed been passed by the company. We agree with State Counsel Sangwa that it is quite clear from the record of appeal that it was not in contention in this case that such a resolution had indeed been passed by the respondent. We therefore allow this ground of appeal.

In their sixth ground of appeal the appellants have argued that the court below misdirected itself on a point of law by founding its decision on assumptions as opposed to facts. Again this is a valid argument that the court below made a number of assumptions on what would happen in the event that the respondent was sued and judgment entered against it. We agree with State Counsel Sangwa that it is not the function of the court to advise the parties how to manage their affairs as the role of the court is to decide issues presented before it on the basis of the facts and the law surrounding that issue. Although we agree with Mr. Mambwe's response to this ground of appeal that it is important for the reasoning to fall within the scope of the dispute at hand, it is not proper for a Judge to make unnecessary assumptions which do not go to the root of the dispute in order to justify his decision.

The seventh ground of appeal is that the court below misdirected itself on a point of law and fact by holding that it would not be in the interest of justice to dismiss the action in the court below. This was so because according to the appellants, the court below was not called upon to decide whether it was in the interest of justice to dismiss the action or not, but whether the action had

been commenced with the authority of the respondent. This holding is at variance with the authorities which point to the fact that there has to be a resolution by the company authorizing the commencement of an action in its name. In the absence of such authority, the commencement of the action is an abuse of the court process. In such an event there are two options open to the court. If the defect in the commencement of the action can be cured by obtaining the relevant authority or by having the decision ratified, the court will not dismiss the action but will stay it and stipulate the period within which the defect can be corrected, in default thereof the action will stand dismissed. However, where the defect is incapable of being corrected the court must dismiss the action. The appellants have argued that it was never the contention of Messrs Muya & Company that they had such authority from the respondent to commence the actions in issue.

We have considered this ground of appeal and are of the view that even though the learned judge erred in trying to distinguish this case from the various authorities cited to him he nevertheless reached the correct decision because at the time of the ruling, the Companies Act had come into effect and the common law defence of

commencing an action without authority was no longer available to the appellants by virtue of sections 23 and 24 of the Companies Act. We therefore dismiss this ground of appeal

Even though the appellants have been successful in respect of certain grounds the net result is that this appeal is dismissed. The parties shall bear their respective costs of the appeal.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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A.M. WOOD
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE