

**SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**SCZ/8/19/2020**

**BETWEEN:**

**POSA ESTATES LTD**

**KATHRYN JEAN SHERRIF**

**EWEN JOHN PINKNEY**

**PAUL NICHOLAS SHERRIF**

**CONSTANCE ANN PINKNEY**

**1<sup>ST</sup> APPLICANT**

**2<sup>ND</sup> APPLICANT**

**3<sup>RD</sup> APPLICANT**

**4<sup>TH</sup> APPLICANT**

**5<sup>TH</sup> APPLICANT**

**AND**

**FIRST NATIONAL BANK ZAMBIA LIMITED RESPONDENT**

**Before Hon. Mr. Justice Nigel K. Mutuna in Chambers this 23<sup>rd</sup>  
day of December 2020**

**FOR THE APPLICANTS:**

**Mr. M. Katolo of Messrs Milner & Paul Legal  
Practitioners**

**FOR THE RESPONDENT:**

**Mr. K. Wishimanga & Mr. S. Musonda both of  
Messers AMW & Company**

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**R U L I N G**

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**Cases referred to:**

- 1. Chainama Hotels Limited & Others v Investrust Merchant Bank (Z)  
Limited SCZ Judgment No. 105 of 2008**
- 2. Re George Inglefield Limited (1993) I Ch 1**

3. **Khalid Mohamed v Attorney General (1982) Z.R. 49**
4. **Savenda Management Services Limited v Stanbic Bank (Zambia) Limited, SCZ Judgment No. 10 of 2018**
5. **BP Zambia Ltd v Yuyi Mubita Lishomwa, Appeal No. 72 of 2007**
6. **Standard Chartered Bank Plc v Wisdom Chanda and Christopher Chanda, SCZ Judgment No. 18 of 2014**
7. **Bidvest Food Zambia Limited & Others v CAA Import & Export Limited appeal No. 56 of 2017**

**Legislation referred to:**

1. **Court of Appeal Act**
2. **Rules of the Supreme Court of England, 1965 (White Book)**
3. **Court of Appeal Rules, 2016**

**Abstract**

1. This is a motion by the Applicants seeking leave to appeal to the full bench of this court against a decision of the Court of Appeal. It is presented in accordance with Section 24(b) & rules 48(1) & 50 of the rules of the Supreme Court Rules, as read with Order 11 rule 1(4) of the Court of Appeal Act.
2. Along with the application for leave to appeal, the Applicants filed an application to stay execution of the judgment of the Court of Appeal pending appeal. The Applicants sought to stay the process of assessing the

judgment sum and eventual execution. It is predicated on this application, therefore, its fate is pronounced in the later part of this ruling.

3. In objecting to the application, the Respondent argued, inter alia, that the application is incompetent as it seeks to assail the ruling of the Court of Appeal dismissing the application for leave and not renew the application in order to challenge the judgment of the Court of Appeal.

### **Introduction**

4. The background leading to this application is that on 23<sup>rd</sup> October 2020, the Court of Appeal rendered a judgment dismissing the Applicants' appeal in its entirety. The appeal arose from a mortgage action and it sought to assail the decision of a High Court Judge on the interpretation given to the rights and duties of a mortgagor and the judgment entered against the Applicants.

5. The main focus of the appeal was on the interpretation of the facility letter which birthed the mortgage contract between the Applicants and the Respondent. The Applicants are unhappy with this decision and sought leave of the Court of Appeal to appeal to the Supreme Court.

**The evidence and arguments presented by the parties**

6. The Applicants have filed a bulky affidavit in support sworn by the Fourth Applicant. In so far as it is relevant to this application, the facts reveal that the basis of the application is as follows:

- 6.1 the Applicants are dissatisfied with the judgment of the Court of Appeal;
- 6.2 there are serious points of law which arise in the proposed appeal that have a bearing on the matter and most mortgage actions in relation to the mortgagor's obligation to account to a mortgagee;

- 6.3 the proposed appeal raises an important point of public importance arising from the misdirection by the Court of Appeal in dismissing the appeal on the grounds that there was no evidence on record to support a particular assertion when the evidence was on the record;
- 6.4 the proposed appeal has high prospects of success as shown by the proposed grounds of appeal produced in the affidavit in support. The grounds also raise crucial points of law of public importance that have an effect on all mortgage actions.
7. The evidence in response by the Respondent was led by Melody Nyendwa Mayoka the legal manager. She began by contesting the propriety of the application by stating that the application is misconceived as it is not a renewal of the decision by the Court of Appeal but rather an appeal against the court's refusal to grant leave to appeal.

8. The witness also testified that the grounds relied upon in the application do not satisfy the test set for such applications. Lastly, the summons pursuant to which the motion was moved is incompetent as it is not signed by the Master of the Supreme Court.
9. In the evidence responding to the substantive testimony by the Applicants, the witness deposed as follows:
  - 9.1 the intended appeal does not raise any points of law of public importance because the grounds of appeal intend to address matters which the Supreme Court has already adjudicated upon;
  - 9.2 the consideration of the evidence contained in the record of appeal by the Court of Appeal does not formulate issues which ought to be presented on appeal to the Supreme Court;
  - 9.3 The Applicants have not met the threshold set by the Supreme Court in respect of applications for leave to appeal based on the ground of reasonable

prospects of success. The Applicants have merely alleged the existence of such prospects of success and do not demonstrate that this is an exceptional case necessitating leave to be granted;

10. In the portion of the relevant part as the skeleton arguments, Mr. Katolo argued that ground 1 of the intended appeal raises a point of public importance in attendance with Section 13(3) of the Court of Appeal Act. He argued that the Supreme Court has pronounced itself on the mortgagor's duty to render an account after the sale of mortgaged property in the case of ***Chainama Hotels Limited & Others v Investrust Merchant Bank (Z) Limited***<sup>1</sup>.

11. Counsel went to great length to state what the Supreme Court said in that case and contended that the High Court decision which was upheld by the Court of Appeal is against that decision. He also referred to the English decision in the case of ***Re George Inglefield Limited***<sup>2</sup>. I

have not discussed counsel's arguments in detail as they are akin to arguing the main appeal for which leave is being sought.

12. The second thrust of Mr. Katolo's arguments contended that the grounds of appeal show that the intended appeal has very high prospects of success. The argument was that the court ought not to have entered judgment in favour of the Respondent because there was no evidence led to prove that the Applicants were owing the amounts claimed. Counsel argued that the Respondent failed to produce a statement of the Applicants' mortgage account in accordance with Order 88 rule 5(10) of the Rules of the Supreme Court of England 1965 (White Book).

13. According to counsel, the Court of Appeal was entitled to examine the evidence presented before the High Court and determined whether or not it was sufficient to sustain the conclusion the court arrived at. He drew my attention to the Supreme Court decision in the case of ***Khalid***



***Mohamed v Attorney General***<sup>3</sup> which espouses this principle and the need for a plaintiff to prove his/her case if he/her is to have judgment. Counsel concluded by submitting that since the Respondent did not produce sufficient evidence to prove its claim the same ought to have been dismissed.

14. I was urged to grant the application.

15. The response by Mr. Wishimanga and Mr. Musonda was from two points. The first point contended that the application was incompetent for the reason set out in the affidavit by the Respondent's witness. They argued that the form and content of the summons launching the motion suggests that the Applicants are by this motion appealing against the ruling of the Court of Appeal refusing leave to appeal. The position taken by counsel was that the Applicants ought to have applied for leave against the judgment of the Court of Appeal in accordance with Order 11 rules 1 to 4 of the Court of Appeal Rules.

16. Counsel argued that in terms of rule 48 of the Supreme Court Rules as read with Order 11 rule 4 of the Court of Appeal Rules, the Applicants were obliged to apply to me for an order for leave to appeal against the Court of Appeal judgment and not the ruling. In doing so, they were also compelled to lay before me grounds of appeal in the summons as set out in Section 13 of the Court of Appeal Act.

17. Counsel argued that the grounds of appeal in the summons do not satisfy the provisions of Section 13 of the Court of Appeal Act. Further, it is a requirement for an applicant to set out grounds as per Section 13 in accordance with the decision of the Supreme Court in the case of ***Savenda Management Services Limited v Stanbic Bank (Zambia) Limited***<sup>4</sup>. In that case, the Supreme Court stated, in relation to leave to appeal, that in applying for such leave it must be granted if the

grounds set out in Section 13 of the Court of Appeal Act are satisfied.

18. To reinforce the argument in the preceding paragraph, counsel contended that the fact that the intended grounds of appeal are set out in the affidavit in support does not cure the defect. They argued that the intended grounds of appeal can not be set out in an affidavit which ordinarily sets out facts and not grounds in support of the application. This they argued is in line with the decision of the Supreme Court in the case of ***BP Zambia v Yuyi Mubita Lishomwa & Others***<sup>5</sup>.

19. The last argument advanced by counsel, in regard to the presentation of the application, contended that the summons were not signed by the Master nor dated. They were, therefore, not in conformity with rule 48(2) of the Supreme Court Rules. They urged me not to ignore the defects in the summons and argued that there was need for the Applicants to cure the defects and that I can not

hear the application no matter how well articulated in view of the defects in accordance with the Supreme Court decision in the case of ***Standard Chartered Bank (Zambia) Plc v Wisdom Chanda and Christopher Chanda***<sup>6</sup>.

20. Counsel for the Respondent then dealt with the substance of the application and in doing so went to great length at analyzing the decision of Supreme Court in the case of ***Bidvest Food Zambia Limited & Others v CAA Import & Export Limited***<sup>7</sup>. They argued that the Applicants have not satisfied the threshold set out in Section 13 of the Court of Appeal Act because the grounds set out in the summons are not provided for under that section. Counsel reiterated the need for the grounds of an application for leave to appeal to be in accordance with Section 13 otherwise, the application will be refused.

21. Taking the argument further, counsel referred to the intended grounds of appeal in the affidavit and concluded

that the matters they seek to bring on appeal have already been adjudicated upon; and that the Applicants are merely dissatisfied with the judgment of the Court of Appeal. They then addressed the two points raised by the Applicants in justifying the application.

22. First counsel dealt with the issue of the appeal raising point of law of public importance and referred to the two arguments by the Applicants that they had attained the threshold. The arguments referred to the duty of a mortgagor to account to the mortgagee after the sale of the mortgaged property, burden of proof to be attained before an order can be granted in a mortgagor's favour and misapprehension of the evidence.

23. Counsel defined what amounts to a legal question of law of public importance in accordance with the ***Bidvest***<sup>7</sup> case and concluded that the issue sought to be addressed in the appeal was not only of a private nature arising from a facility Letter and mortgage deed governing the

relationship of the parties, but had been pronounced upon by the Supreme Court already. Further, there was nothing in the issue requiring the Supreme Court to review from which the public at large would benefit.

24. In regard to prospects of success, once again, counsel referred to the ***Bidvest***<sup>7</sup> case and restated the new role of the Supreme Court after the introduction of the Court of Appeal. They emphasized that the Supreme Court's purpose is not to routinely correct errors made by lower courts. The need to be strict in applying the test in Section 13 of prospect of success bearing in mind the fact that the need for finality in litigation far outweighs the need to routinely correct human errors.

25. Counsel concluded that there was no effort made by the Applicants to demonstrate that the appeal has reasonable prospects of success and that it was an error on their part to attempt to do so by reference to the grounds of appeal. Counsel concluded by examining each ground of appeal

and advancing arguments against it. This was akin to arguing the main appeal so I have not summarized this part of the arguments.

26. I was urged to dismiss the application.

27. In reply to the evidence by the Respondent, the Applicants filed an affidavit in reply by the Fourth Applicant. He testified that the application before me is one for renewal of the application for leave to appeal which was declined by the Court of Appeal. Therefore, he denied the contention by the Respondent to the contrary.

28. The witness also deposed that the matter the Applicant wished to bring before the Supreme Court had not been adjudicated upon before and are matters of public importance.

29. In the arguments in reply, Mr. Katolo contended that the application is competent. He argued that the summons state that the Applicants would rely on the affidavit in

support which sets out grounds of appeal in accordance with Section 13 of the Court of Appeal Act.

30. Counsel reiterated that the Applicants had met the threshold and the application should be granted.

31. This was the evidence and arguments presented before me. There were no *viva voce* arguments because at the hearing of the matter on 18<sup>th</sup> December 2020, the parties agreed, by consent, that I should determine the application purely on the documents they had filed before me.

### **Consideration and decision**

32. Let me begin by addressing the preliminary objection raised by the Respondent, in respect of the manner and form the motion is tabled before me, because this has a bearing on the eventual outcome of this application. I do agree that the summons appear, on the face, to suggest that this application is not a renewal of the application for leave to appeal which was refused by the Court of Appeal



but rather an appeal against the ruling. This is evident from the wording of the summons which identify itself as being an application in respect of the ruling of the Court of Appeal (not judgment) dated 20<sup>th</sup> November 2020.

33. The summons go further to set out two grounds which seek to assail the ruling and in doing so attack the ruling and not the judgment. As counsel for the Respondent has quite rightly argued, an application for leave to appeal before a single judge of the Supreme Court is a renewal of the application that is refused by the Court of Appeal. It is not an appeal against the ruling refusing the application and leave is sought to attack a judgment of a court below not the ruling denying leave.

34. To the extent that the summons had these flaws it was defective. The Applicants' predicament is compounded by the fact that the summons do not anywhere state that its intent is to seek leave to appeal against the judgment of the Court of Appeal dated 23<sup>rd</sup> October 2020.

35. Although the body of the summons states that the Applicants seek leave to appeal to the Supreme Court, it does not state that such leave is in respect of the judgment. It, instead, sets out grounds which as I have stated earlier attack the ruling. In so doing, it has made the subject matter of this application to be the ruling.
36. Applications for leave to appeal, such as this one, when escalated to a single judge of the Supreme Court, are a renewal of the application which was before the Court of Appeal. They refresh or give the Applicant another opportunity to launch the same application before the judge of a higher court and, thereafter, if need be, three judges of the higher court. The application to renew should, as counsel for the Respondent argued, set out intended grounds which are in line with Section 13 of the Court of Appeal Act.
37. The intention of renewal is not revealed in the summons before me whose role should not be down played. A count

determines the nature of the application before it with reference to the endorsement on the summons on notice of motion. It is the endorsement which also informs the party opposite of the case it has to respond to.

38. The omission by the Applicants is not cured by the affidavit evidence and skeleton arguments which refer to Section 13 of the Court of Appeal Act and the principles on leave to appeal. I say this because, they in no way compliment the summons which speaks to an entirely different relief. They have just enhanced the confusion brought about by the wrong endorsement.

39. Arising from what I have stated in the preceding paragraphs, I have come to the inescapable conclusion that the application is incompetent and should be dismissed. I accordingly, dismiss it with costs.

40. As regards the application for a stay of execution, the record will show that I indicated to counsel for the Applicants that I did not consider it before hearing this

application because a preview of the application showed that there was no eminent and immediate danger of execution. This position was not changed as at the date of delivery of the ruling because counsel indicated that the assessment was still ongoing, therefore, no figure had been determined yet against which a writ of execution would be issued. Be that as it may, the application has been rendered otiose because it was predicated on the outcome of this application.

Dated at Lusaka this day of 23<sup>rd</sup> of December 2020



**Nigel K. Mutuna**  
**SUPREME COURT JUDGE**