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Selected Judgment No.
21/2012

**IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)
121/2011**

**SCZ /8/ 126/2011
Appeal No.**

BETWEEN:

WATSON NKANDU BOWA (suing as Administrator
of the Estate of the late Ruth Bowa)

APPELLANT

AND

**FRED MUBIANA
RESPONDENT
ZESCO LIMITED
RESPONDENT**

1ST

2ND

**CORAM: CHIBESAKUNDA, WANKI AND MUSONDA, JJJS.
On 20th March 2012 and 22nd June 2012.**

For the Appellant: Mr. L. Moono of Nkana Chambers

For the Respondent: Mr. M. V. Chiwale - Chief Legal Officer

J U D G M E N T

Musonda, JS, delivered the Judgment of the Court.

Cases Referred To:

1. Zambia State Insurance Corporation Vs Muchili (1988 - 1989) ZR 149.

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2. Sonny Paul Mulenga and Vismer Mulenga, Chainama Hotels Limited and Elephants Head Hotel Limited Vs Investrust Merchant Bank.

3. Konkola Copper Mines Plc, Zambia State Insurance Corporation Limited Vs John Mubanga (as Administrator of the Estate of the late Geoffrey Chibale) and Other Administrators (2004) ZR 233.

4. Litana Vs Chimba and Another (1987) ZR 26.

5. Kalunga (suing as Administrator of the Estate of the late Emmanuel Bwalya) Vs Konkola Copper Mines Plc (SCZ No. 5 of 2004) unreported.

This was an appeal against the learned trial Judge's review of her judgment dated 13th April 2011.

The brief background to this appeal is that, the plaintiff who is the appellant in this court sued in his representative capacity as administrator of the Estate of Ruth Bowa. The claims were for:

(i) Damages under the Fatal Accidents Act 1846 to 1908 on behalf of the late Ruth Bowa

**(ii) Damages under the Law Reform
(Miscellaneous Provisions) Act Chapter
74**

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**of the Laws of Zambia for loss of life of
Ruth Bowa**

**(iii) Special damages in the sum of
K5,120,000.00**

**(iv) Any other relief plus interest on sums
found due and costs**

The learned Judge awarded the total dependency to be shared equally by children the sum of K129,600,000.00 after deducting K6,000,000.00 award under the Law Reform Miscellaneous Provisions Act in her judgment dated 13th April 2011.

On 20th April 2011 the second respondent applied ex parte to stay the judgment, which application was heard inter-parte on 27th April 2011. The essence of the application was that, the

appeal would succeed because the persons who were awarded the damages were not entitled under Section 2 of the Fatal Accidents Act 1846 and Section 3 of the Law Reform (Miscellaneous Provisions Act) as the two children were not illegitimate children i.e. born out of wedlock. They were just relatives of the deceased.

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The learned trial Judge reviewed her judgment pursuant to Order 39 Rule 1 of the High Court Rules. She took into account the

evidence that the beneficiaries were not illegitimate children i.e. children born out of wedlock, they were relatives.

Consequent to such finding she held that the plaintiff's case was misconceived because the children on whose behalf the action was brought were not biological children of the deceased, they were not adopted by the deceased and were not born out of wedlock.

The appellant dissatisfied with the order for review appealed to this court. The appellant filed three grounds of appeal as follows:

(1) The learned trial Judge erred both in law and fact when she reviewed on her own motion her judgment dated 13th April 2011 basing the said review on an application to stay execution.

(2) The learned trial Judge misdirected herself when she reviewed her own judgment on the grounds of appeal which were advanced by the respondent.

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(3) The learned trial Judge erred both in law and fact when she reversed the whole judgment dated 13th April 2011 on grounds that the plaintiff's case was misconceived because the children on whose behalf the action was brought were not biological children of the deceased.

On behalf of the appellant learned Counsel Mr. Moono filed Heads of Argument and list of authorities on which he entirely relied in arguing this appeal.

Learned Counsel combined his arguments in grounds one and two. He referred us to Order 39 Rule 1, which is couched in these terms:

“Any Judge may upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is withdrawn) and upon such review, it shall be lawful for him to open, and take fresh evidence and to reverse, vary or confirm his previous judgment or decision”

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It was Mr. Moono’s argument, that the review undertaken was based on submissions for stay of execution. It was therefore contended that it was wrong in principle for the trial Judge to have reviewed her judgment on submissions by Counsel for the respondent, on an application to stay execution and call that

“fresh evidence”. In doing so the lower court assumed the role of the appellate court and determined the appeal against its own judgment.

In ground three, it was submitted that the learned trial Judge erred both in law and in fact when she reversed the whole judgment dated 13th April 2011 on the ground that it was misconceived because the children on whose behalf the action was brought were not biological children of the deceased. The lower court had initially correctly awarded the plaintiff the sum of K5,120,000.00 as funeral expenses claimed under the head “special damages”. Funeral expenses are recoverable by the estate under the Law Reform (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia.

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Mr. Moono cited our decision in ***Zambia State Insurance Corporation Vs Muchili***,⁽¹⁾ where we said:

“Funeral expenses reasonably incurred by the estate and reasonable in extent are by statute always recoverable”

Mr. Moono went on to state that, the lower court grossly misdirected itself as damages under the law Reform are for loss of expectation of life of the deceased and for the benefit of the estate. The award under this head is not for the benefit of the dependants mentioned under the head for the damages under the Fatal Accidents Acts 1846 to 1908.

Under Section 1 of the Fatal Accidents Acts 1846 to 1959, an action under the said Acts, should and normally is brought by the Executor or administrator of the deceased for the benefit of all dependant relatives who have suffered pecuniary loss as a consequence of the deceased's death. According to Section 2 and 5 of the Fatal Accidents Act, 1846 as amended by Section 3 (1) of the

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Law Reform (Miscellaneous Provisions) Act, the dependants of the deceased for whose benefit such an action may be brought are

wife, husband, children, grandchildren, father, mother, grandparents and step-grandparents and any other who is or is the issue of brother, sister, uncle, aunt including in any case illegitimate and adopted children, and any relationship by affinity or consanguinity and any relationship of the half blood as the whole blood.

Mr. Moono concluded his submissions by arguing that, the action was brought for the benefit of Chama Bowa and Mutinta Hamachila which children were staying with the deceased and dependent on the deceased for their livelihood. Chama Bowa was the deceased's brother, while Mutinta Hamachila was the niece. It is clear that the two children were dependants within the confines of Sections 2 and 5 of Fatal Accidents Act.

Mr. Chiwale equally combined his response to ground one and two. He argued that it is settled law that in determining whether or not to grant an order to stay execution pending appeal, the court below needs to be satisfied that the Judgment, Ruling or Order

being stayed is likely to be successfully appealed against. He cited our decision in ***Sonny Paul Mulenga and Vismer Mulenga, Chainama Hotels Limited and Elephants Head Hotel Limited Vs Investtrust Merchant Bank,***⁽²⁾ where we said:

“In terms of our rules of court, an appeal does not automatically operate as a stay of execution and it is utterly pointless to ask for a stay solely because an appeal has been entered. More is required to be advanced to persuade the court below or this court that it is desirable, necessary and just to stay a judgment pending appeal.....In exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of success of the proposed appeal”

It follows, necessarily, that for the court below to grant an order to stay its own Judgment, Ruling or Order, it needs to satisfy itself that there is likelihood that the appeal will succeed.

Mr. Chiwale argued that the provisions of Order 39 Rule 1 of the High Court Rules were met in that:

- (1) The Judge below was of the view that there were sufficient grounds to review and reverse her own judgment, which judgment was likely to be set aside on appeal.***
- (2) The respondents appeal had been withdrawn at the time she reversed her own judgment.***
- (3) The Judge below had taken fresh evidence before she reviewed her judgment. This fresh evidence related to one Mutinta Hamachila who was purported to be one of the beneficiaries of the Estate at hand. The fresh evidence was by the appellant's advocate.***

In response to ground three, Mr. Chiwale submitted that there was no evidence that the children who were held to be beneficiaries in the judgment at pages 11 to 25 of the record of

appeal were either biological, illegitimate or adopted children of the late Ruth

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Bowa. Section 3 (1) of the Law Reform (Miscellaneous Provisions) Act which is couched in these terms was cited to us:

“3 (10) For the purposes of the Acts, (i.e. the Fatal Accidents Acts 1846 to 1908), a person shall be deemed to be a parent or child of the deceased person withstanding that he was only related to him illegitimately or in consequence of adoption, and accordingly in deducing any relationship which under the provisions of the Acts is included within the meaning of the expressions “parent” and “child”, any illegitimate offspring of his mother and reputed father or, as the case may be his adopter”

This court was urged to uphold the reversal of the award of funeral benefits, which are awardable under Section 3 (2) of the Law Reform (Miscellaneous Provisions) Act, as they were incurred

by the father of the deceased whom the court below adjudged as not a beneficiary of the estate.

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We have seriously considered submissions from both Counsel. The issues as we have digested them are:

- (i) Was it appropriate for the learned trial Judge to base her review under Order 39, on the application to stay execution pending an appeal, which appeal was later withdrawn.**
- (ii) What is the distinction between issues the trial court and the appellate court takes into account when granting a stay of execution pending appeal and the issues which make a trial court to review its earlier decision?.**
- (iii) Was the assessment in the initial judgment wrong in principle?.**

We agree with Mr. Chiwale that our decision in **Sonny Paul Mulenga Vs Investment Merchant Bank supra** governs the granting or non-granting of applications to stay execution of judgments pending appeal. However, we do not agree that the

trial Judge can base the review of the judgment on summons for an application to stay execution pending appeal. The trial Judge will be dealing with the merits and demerits of the appeal, which are

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issues for the appellate court, moreso when such an appeal has been withdrawn.

In an application for stay of execution pending appeal, the considerations are: the prospect of the appeal succeeding and the irreparable damage if a stay is not granted and the appellants' appeal succeeds. The philosophy underlying review under Order 39 of the High Court Rules, is not to irreversibly bind a High Court Judge to a ruling or judgment in circumstances where:

- (i) Fresh evidence not available at trial surfaces;***
- (ii) This could not have been discovered with due diligence;***

(iii) Such evidence is relevant and would serve the ends of justice.

It is critical if procedural justice has to be subserved that both parties are heard, so that the credibility of such evidence is tested before the court makes a decision. A trial Judge, cannot as in this case merely reverse her decision, because after having sight of the

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grounds of appeal, she forms the opinion that, she may have misdirected herself on a point of law or fact. That is a misdirection. Stay of execution pending appeal and review under Order 39 are qualified under different grounds. Different also are the principles that sustain such applications. We agree with Mr. Moono that the grounds for review did not exist. There is merit in grounds one and two of the appeal. The review was a nullity.

We will now consider whether the learned trial Judge's judgment of 13th April 2011 could stand. The learned trial Judge quoted the provisions of Section 2 (5) of the Law Reform (Miscellaneous) Provisions Act, Chapter 74 of the Laws of Zambia.

“2 (5) the rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts 1846 to 1908, of the United Kingdom or any law for the

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time being in force relating to carriage by air, and so much to this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)”

Section 3 (1) and (2) of the same Act provides:

“3 (1) For the purposes of the Acts, a person shall be deemed to be a parent or child of the deceased person notwithstanding that he was only related to him illegitimately or in consequence of adoption, and accordingly in deducing any relationship which under the provisions of the Acts is included within the meaning of the expressions “parent” and “child, any illegitimate person and any adopted person shall be treated as being or as having been, the legitimate offspring of his mother and reputed father or, as the case may be, of his adopter.

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(2) In an action brought under the Acts, damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought:

In the learned trial Judge’s view, the Act applied as its provisions were unambiguous. The children who were being kept by the deceased person should be deemed to be her children

notwithstanding that they were only related to her illegitimately. They both were dependent upon the deceased person.

In her awarding the loss of dependency the learned Judge relied on our decision in ***Konkola Copper Mines Plc, Zambia State Insurance Corporation Limited Vs John Mubanga (as Administrator of the Estate of the late Geoffrey Chibale) and other Administrators***⁽³⁾, where we said:

“Awards for loss of dependency must be given to each specific dependant according to the degree of dependency. In calculating awards for loss

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of dependency, the factors that are taken into account include, the possibility of the deceased if he had died, dying when the dependants are still dependent, dying early, the possibility of the widow re-marrying and the ages of the minor dependants”

When dealing with an award under the loss of expectation of life head, our decision in ***Litana Vs Chimba and Another***⁽⁴⁾ was cited where we said:

“Awards for loss expectation of life under the Law Reform (Miscellaneous Provisions) Act should be moderate and should be fixed regardless of the age of the deceased”

We awarded K1,500 in 1987. This court has progressively been increasing the award under this head. For example, in ***Kalunga (suing as Administrator of the Estate of the late Emmanuel Bwalya) Vs Konkola Copper Mines Plc***,⁽⁵⁾ we raised the award to K5,000,000.00.

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As regards to loss of dependency, the learned trial Judge referred to our decision in ***Zambia State Insurance Corporation Vs Muchili supra***, where we said:

- (i) Where the dependants of the deceased are the same the Law Reform damages have to be deducted from the damages under the Fatal Accidents Acts;**
- (ii) A dependant's pecuniary loss, if it is to be recoverable at all, must be attributable to the family relationship recognized by the Fatal Accidents Acts;**
- (iii) Loss of pecuniary benefit (which may be actual or prospective) arising from the relationship which would be derived from the continuance of life and which may consist of money, property of services; that is to say, the value of dependency is recoverable.**

Mr. Moono in arguing the third ground referred us to the same case buttressing his argument that funeral expenses, loss of expectation of life and dependency were awardable in this case.

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Mr. Chiwale was of the view that under Section 3 (1) of the Law Reform (Miscellaneous Provisions) Act, which provision we earlier referred to, only an illegitimate or adopted child were entitled to dependency.

It was therefore a misdirection for the learned trial Judge to award dependency to children who did not fall in this category.

We have said it on numerous occasions dependants are entitled to dependency. This is a question of fact and this was so found by the learned trial Judge.

Section 2 (5) which Mr. Chiwale did not refer to states that:

“2 (5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased person by the Fatal Accidents Acts 1846 to 1908, of the United Kingdom or any law for the time being in force relating to carriage by air, and so much of this Act as relates to causes of

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action against the estates of deceased persons shall apply in relation to causes of action under the said Acts as it applies in relation to other causes of action not

expressly excepted from the operation of subsection (1)”

It is patently clear that both the Fatal Accidents Act 1846 and the Law Reform (Miscellaneous Provisions) Act, recognize the dependants as beneficiaries. Black’s Law Dictionary has defined “dependant”:

“One who relies on another for support, one not able to exist or sustain oneself without the power or aid of someone else”.

In the above circumstances someone becomes a “legal dependent” once the guardian passes-on and is entitled to invoke the laws to enforce that support by claiming “dependency” under the Fatal Accidents Act 1846 - 1908. Dependency is premised on the loss of financial and material support by those whom the deceased was taking care of when he/she was alive.

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The learned trial Judge was on firm ground in her initial judgment. We now come to the assessment of damages. We

note that not too long ago we awarded K5,000,000.00 for loss of expectation of life, she awarded K6,000,000.00, we uphold the award under that head. This court has critically looked at the multiplicand and the multiplier, the learned Judge was on firm ground, we uphold the award of K135,000,000.00 less K6,000,000.00 awarded under the Law Reform Miscellaneous Provisions Act, leaving the net award of K129,600,00.00. The award of special damages of K5,120,000.00 is a modest figure considering the inflationary trends, as this was expended a year ago. The appeal has succeeded on all the three grounds and the costs will follow the event.

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L.P. Chibesakunda
SUPREME COURT JUDGE

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M.E. Wanki
SUPREME COURT JUDGE

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P. Musonda
SUPREME COURT JUDGE