

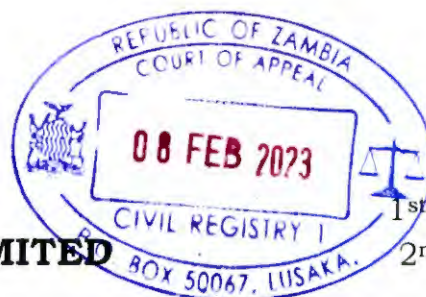
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 142 of 2022
CAZ/08/159/2022

(Civil Jurisdiction)

BETWEEN:

BRISK FAST LIMITED
BRISK FAST TRADING (PTY) LIMITED



1st Appellant
2nd Appellant

AND

WONDER FUNDIWA AND 166 OTHERS
THE LEGAL AID BOARD

1st - 167th Respondent
168th Respondent

GOLDBELL TRADING AND LOGISTICS
(PTY) LIMITED

1st Intervenor

GOLD MOUNTAINS HK INTERNATIONAL
MINING CO LTD

2nd Intervenor

NORTH START AFRICAN INTERNATIONAL
LOGISTICS (PTY) LIMITED

3rd Intervenor

CHINA RAILWAY RESOURCES GROUP
COMPANY LIMITED

4th Intervenor

BEIJING SUN RISING TRADE & ECONOMIC
DEVELOPMENT COMPANY LIMITED

5th Intervenor

CORAM: Makungu, Ngulube and Sharpe-Phiri, JJA
on 17th January 2023 and 8th February 2023

For the Appellants:

Mr. G. Pindani, Chonta, Musaila
& Pindani Advocates

For the 1st to 167th Respondents: Mr. C.K. Simukonda, Kangombe &
Associates

For the 168th Respondent: Mr. J.K. Matende & Ms. M. Marebesa, Legal Aid Board

For 1st & 2nd Intervenor: Mr. P. Chomba, Mulenga Mundashi & Company

For the 3rd, 4th & 5th Intervenors: Mr. J. Zulu, Japhet Zulu Advocates

J U D G M E N T

SHARPE-PHIRI, JA, delivered the Judgment of the Court

Legislation referred to:

1. *The Court of Appeal Rules, Statutory Instrument No. 65 of 2016*
2. *The Rules of the Supreme Court of England, (White Book) 1999 Edition*
3. *The Constitution of Zambia (Amendment Act) No. 1 of 2016*

Cases referred to:

1. *Zambia Telecommunications Company Limited v Aaron Mweene Mulwanda and Others (2012) Vol. ZR 404 SC*
2. *Minister of Home Affairs, Attorney General and Lee Habasonda (2007) ZR 207*
3. *Zulu v Avondale Housing Project (1982) ZR 172*
4. *William Harington v Hon.Dora Siliya and The Attorney General SCZ 14 of 2011*
5. *First National Bank Zambia Limited v Chizmani Investments Limited Appeal 162 of 2019, CA*
6. *Raphael Chisupa v African Banking Corporation Zambia Limited CAZ Appeal 11 of 2019*
7. *Kelvin Hangandu and Company (a firm) v Webby Mulubisha Vol. 2 ZR 82*

Other works cited

1. *Matibini, P, Zambian Civil Procedure Commentary and Cases, Volume 2, 2017, page 1120-1121, Lexis Nexis*

1.0 INTRODUCTION

- 1.1 This is an appeal against the ruling of Mwansa, J of the Industrial Relations Division of the Lusaka High Court delivered on 21st April 2022.
- 1.2 By that ruling made under cause number COMP No. IRCLK/204/2022, the learned trial Judge ordered a stay of execution of a Consent Order/Judgment of 10th March 2022 made under cause number COMP/IRD/LK/684/2021 and executed by Banda, J (as he was then).
- 1.3 The learned trial Judge also ordered that the action in the Lusaka High Court for Zambia under cause number COMP No. IRC/LK/204/2022 be consolidated with COMP number IRD/LK/684/2021 and be heard by the Judge hearing the latter case.

2.0 BACKGROUND

- 2.1 The brief background of this case is that the 1st and 2nd Appellants Brisk Fast Limited and Brisk Fast Trading (Pty) Limited commenced an action by way of Notice of Complaint (as 1st and 2nd Complainants) in the Industrial Relations Division of the Lusaka High Court on the 6th December 2021 under cause

number COMP/IRCLK/684/21 against Enock Mashilipa and 245 others.

2.2 The action was brought pursuant to **Section 85(4) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia** seeking the following reliefs:

- (i) Damages and compensation for breach of employment contract by failing to timely deliver the goods and/or surrender property to the employer.
- (ii) An order to set off all accumulated penalties, parking fees and losses caused by the complainant as well as unaccounted for/in retired trip money against terminal benefits due and payable to the respondents.
- (iii) Interest on any monies found due.
- (iv) An order of interim mandatory injunction to compel the respondents to surrender property which came into their possession by virtue of their employment and afterwards stay away from the property.
- (v) Legal costs of and incidental to this action.
- (vi) Any other relief the Court may deem fit.

- 2.3 The 1st and 2nd Appellants also brought an application for a mandatory injunction directing the Respondents to surrender the Appellants' property exhibited on 'DM4b' which came into the Respondents' possession by virtue of their employment.
- 2.4 The 1st and 2nd Appellants further contended that the Respondents were employed to transport goods from South Africa via Botswana, Zimbabwe and Zambia to the Democratic Republic of Congo and back, with agreed remuneration packages and allowances.
- 2.5 That however, the Respondents while en route/transit to various destinations transporting cargo, unilaterally decided to park the trucks laden with high-value cargo in Lusaka, Chingola and at borders with the Democratic Republic of Congo and Zimbabwe respectively. The Respondents' stance turned out to be a protest over purported unpaid allowances.
- 2.6 The Appellants further contended that all efforts to resolve the impasse with the Respondents were unsuccessful and that the Respondents' actions would negatively impact on the Appellants' business and cause them to suffer enormous financial losses which would be irreversible if the Respondents continued to hold on to the company property.

- 2.7 The Respondents defended the application for a mandatory injunction, contending that they were holding onto the Appellants' properties and exercising a lien because of employment benefits owed to them following unilateral repudiation of their contracts.
- 2.8 After considering this application, the learned trial Judge found that the properties that the Respondents were holding onto belonged to a company called North Star South Africa International, who was not the Respondents' employers and the said company was not a party to the proceedings.
- 2.9 The learned Judge also held that the Respondents' claim to be exercising a lien to justify detention of the trucks was unfair and not supported by any law. The Judge granted the mandatory injunction and directed the Respondents to surrender to their former employer all the transit documents, keys, cargo, and all property exhibited on 'DM4b' which came into their possession by virtue of their employment.
- 2.10 The learned trial Judge also ordered the 1st Appellant to pay into Court the following amounts:
- (i) K4,167,667.28 forthwith in satisfaction of what was considered to be owing to the Respondents in form of severance and gratuity benefits;

- (ii) K5,000,000 forthwith as security towards the payment of benefits to the Respondents depending on the outcome of the case after the hearing of the dispute.

2.11 Following the above ruling of the Court of 19th January 2022, the Respondents filed an application for a stay of execution of the said ruling on the basis that they had lodged an appeal against the ruling. The Respondents contended that they would suffer irreparable damages if a stay of execution was not granted as the Appellants are not domiciled in Zambia

2.12 The Appellants opposed the application for a stay, arguing that they had suffered and continued to suffer accumulated colossal expenses, company losses, damage, and penalties among other costs to be incurred from the time the Respondents parked the trucks laden with high-value goods.

2.13 After determining the application for a stay of execution, the learned Judge found that the application for a stay of his ruling of 19th January 2022 had merit and accordingly granted a stay of execution of the mandatory injunction ruling on the 4th February 2022 under cause number COMP/IRCLK/684/2021.

2.14 A Consent was filed into Court on 10th March 2022 (page 152 of the Record of Appeal). The said Consent Order, which was drawn by the Legal Aid Board on behalf of the Respondents, is

consented to by the Legal Aid Board and Messrs Chonta Musaila and Pindani on behalf of the Respondents and Appellants respectively and endorsed by Judge Joshua Banda, filed under COMP/IRD/LK/684/2021.

2.15 The said Consent Order reads as follows:

“By CONSENT of the Complainants and the respondents acting through their respective advocates herein having considered the loss of business, other financial losses, possible penalties and parking fees being suffered and incurred by the parties and the legal implications of the within court proceedings, IT IS HEREBY AGREED and ORDERED as follows:

- (i) THAT the Respondents who are not willing to work under the Complainants herein or North Star Logistics (NSL) surrender all the transit documents, keys and cargo and all property including trucks and trailers which came into their possession by virtue of their employment to the Complainants to enable the continuation of the business operations.***
- (ii) THAT the Respondents continuing with work either under the Complainants herein or North Star Logistics (NSL) immediately proceed to move with the trucks.***
- (iii) THAT this consent order is by virtue of the agreement between the Respondents through their advocates herein and North Star Logistics (NSL) dated 1st February 2022.***

(iv) THAT the within Consent Judgment has been entered into freely, without fraud, undue influence, coercion, deceit, mistake, or any other irregularity.

(v) THAT the costs of this consent order be in the cause.

2.16 Subsequently, an application to stay execution of the Consent Order of 10th March 2022 was brought by the Respondents by summons on 17th March 2022 under cause number IRCLK/204/2022 (see page 166 of the Record of Appeal, Vo. 1). In support of this application, the Respondents filed an affidavit of even date under cause number COMP No. IRCLK/684/2021, sworn by Wonder Fundiwa, Charles Mweengata and Oliver Katsache, Respondents in the action. They gave a brief history of the matter that following an action being taken out against them, they were being represented by Mauyaneyi Marebesa, Legal Aid Counsel at the Legal Aid Board.

2.17 Following differences with their lawyer in February 2022, they terminated her services and retained Messrs Kang'ombe & Associates to act on their behalf. They contended that they were informed and believed that their Counsel filed into Court their Notice of Appointment of Advocates and served the same on Legal Aid Board on 14th February 2022, together with a letter notifying the Legal Aid Board that the firm of Messrs Kang'ombe & Associates were to represent the 167 Applicants.

- 2.18 The deponents further contended that they were advised that on 10th March 2022, their Advocates had conducted a search at the High Court Registry and discovered that the Legal Aid Board had filed a summons for entry of a Consent Order. By virtue of the said Consent Order, the Respondents, who were not willing to work under the Complainants or North Star Logistics, were compelled to return or surrender all transit documents, keys and all property, including trucks and trailers to the Complainants.
- 2.19 The deponents further contended that the said consent order, which had the effect of concluding the matter between them and the Complainants in the original action, was fraudulent in that it was not a product of involvement of all the Respondents. They alleged that there may have been connivance by the parties who executed the Consent Order to disadvantage or prejudice them.
- 2.20 The deponents also contended that they had filed an ex parte application for attachment of the trucks and trailers that came into their possession by virtue of their employment, which application had to date not been heard and determined.
- 2.21 The further contention was that the Respondents were desirous of having the matter heard under COMP/IRD/LK/684/2021 and that they had filed an affidavit in opposition. They therefore sought a stay of execution of the Consent Order.

3.0 **AFFIDAVITS IN OPPOSITION**

- 3.1 An affidavit in opposition to the application for a stay of execution of the Consent Order of 10th March 2022 was filed on 31st March 2022 under cause number 2022/HP/0408, sworn by one Mauyaneyi Marebesa, an advocate of the High Court seized with conduct of cause no. COMP/IRD/LK/684/2021 on behalf of the 246 Respondents (at page 238 of the Record of Appeal). Counsel contends that she has authority to depose to the contents of this affidavit from facts within her personal knowledge and information, having represented the 246 Respondents in the action under cause number COMP/IRD/LK/684/2021.
- 3.2 In relation to paragraph 2 of the affidavit in support in which the 164 Applicants contend that they are drivers in the employ of the 1st Respondent, Counsel avers that this is not a true statement as the 164 drivers were all no longer employed by the 1st Respondent following their mutual agreement with the 1st respondent, that their contracts of employment had been frustrated by the events of xenophobia that were prevailing at the time. Counsel referred to exhibit 'MM1' as resolutions of the agreement of the parties. She also contended that the 246 drivers were no longer being represented by Legal Aid Board and confirmed that the contentions made in paragraph 3, 4, 5 and 7 of the affidavit in support were not in dispute.

- 3.3 In response to the contentions that Counsel had intimated that she would not respond to the letter from her client, Counsel stated that this was untrue. She had never at any point tried to convince the deponents or any of the 246 drivers to accept amounts less than what they were claiming under cause number COMP/IRD/LK/684/2021. That their claims were still intact and scheduled to be heard before the Court.
- 3.4 Counsel further contended that 246 drivers were being represented by 10 drivers whom they had chosen amongst themselves as the persons she would directly interact with as it was impossible for her to interact with all 246 at the same time given their different locations. She stated that the group leader of the 166 was Wonder Fundiwa.
- 3.5 Counsel stated further that after the ruling of 19th January 2022, wherein the Court had opined that the trucks belonged to a 3rd party, North Star Logistics (NSL), the 246 drivers through their representative notified her that they had been approached by North Star Logistics in an attempt to resolve the matter. She gave the Respondents the go-ahead to negotiate with North Star Logistics directly since they were not party to the proceedings before Court.
- 3.6 Counsel went on to explain that the Respondents gave her regular updates on their negotiations with North Star Logistics

regarding a settlement with the drivers for the release of the trucks belonging to North Star Logistics to avoid loss of business on their part. She was later informed that after numerous meetings between the representatives of the 246 drivers and the North Star Logistics, an agreement was reached in relation to a figure of K7,000,000. The offer letter from North Star Logistics was sent to her as proof thereof. A copy was exhibited as 'MM2' and shown at pages 253 to 254 of the Record of Appeal.

3.7 Counsel stated further that following receipt of this offer, the 10 representatives of the drivers met with her and instructed her to accept the offer and communicate their acceptance to North Star Logistics, which she did. The letter was exhibited as 'MM2' shown at page 255-256 of the Record of Appeal. The said letter, dated 1st February 2022, was endorsed by Enock Mashilipa and herself as legal representative at the request of North Star Logistics and did set out the terms of agreement between the parties.

3.8 Counsel stated that the terms of the offer from North Star Logistics had no bearing on the Respondents' claims in cause number COMP/IRD/LK/684/2021 but only affected the case regarding the continued detention of the trucks belonging to North Star Logistics. It was agreed further that the second ground of appeal would be withdrawn from the appeal before the Court of Appeal in cause number CAZ/08/20/2022.

- 3.9 In line with the agreement between North Star Logistics and the 246 drivers as per correspondences of 1st and 2nd February 2022 shown at pages 255-260 of the Record of Appeal. North Star Logistics proceeded to deposit the 1st instalment payment into the Legal Aid Board account on 4th February 2022.
- 3.10 Following payment into their account of the monies from North Star Logistics in 246 drivers, a dispute arose with some of the drivers on account of miscommunication over the North Star Logistics agreement. This led to a physical altercation resulting in injury to Enock Mashilipa and one Wonder Fundiwa being on the run.
- 3.11 Counsel further contended that in spite of the confusion and disagreement between the parties, some of the drivers had begun receiving funds from the Legal Aid Board in line with the North Star Logistics agreement.
- 3.12 In response to the allegation that the Legal Aid Board had ceased to represent them, Counsel contended that the drivers were obliged by law to write to the Director of Legal Aid to withdraw Legal Aid from representing them. However, despite advising the parties of this legal requirement, they have not written to withdraw Legal Aid. Therefore, the Legal Aid Board was still on record as representing the drivers.

3.13 Counsel further contended that the Consent Order was entered into on behalf of the 167 drivers as Legal Aid Board are still on record as representing them as none of them had withdrawn Legal Aid. Further, that there is no fraud or illegality on their part as they were instructed to implement the North Star Logistics agreement which was freely entered into by the drivers themselves. Counsel further stated that the provisions of the law were clear on how Legal Aid is to be withdrawn and this could not be done by Messrs Kang'ombe & Associates.

3.14 Counsel further contended that Messrs Kang'ombe & Associates had not intimated which 167 drivers it was representing. That 41 of the said 167 drivers were on the Legal Aid list and had received the North Star Logistics money.

3.15 Counsel reiterated that the Consent Order only related to the North Star Logistics agreement in relation to the trucks which belong to North Star Logistics and had no bearing on the claims under cause number COMP/IRD/LK/684/2021. She further submitted that this application was a grave misconception, and so were the claims that the Consent Order concludes cause number COMP/IRD/LK/684/2021, when in fact not.

3.16 Further, that it was wrong to suggest that she coerced 246 drivers to sign the North Star Logistics agreement when she was never part of the discussions leading up to the North Star Logistics agreement.

3.17 Further, that the North Star Logistics was in favour of the drivers who received a free goodwill offer of K25,600 each, plus an offer of employment, which was aside from the separation and statutory package to be received from the 1st and 2nd Appellants.

3.18 Another affidavit in opposition to the summons to stay execution of the Consent Order is on record (shown at page 167 to 173 of the Record of Appeal), dated 30th March 2022 and filed under cause no. 2022/HP/0408. Although it is filed under a different cause number, it appears to have been the affidavit in opposition used in the application before the lower Court as the Appellants' Counsel refers to this affidavit in their heads of argument.

3.19 The affidavit is sworn by one Lingbin Yang, a director of the 1st and 2nd Appellant companies. He stated that the application to stay execution of the Consent Order before the lower Court was an abuse of Court process as the same application had been made before Banda, J under cause number COMP/IRD/LK/684/2021.

3.20 The deponent also stated that Mr. Simutenda and Ms. Marebesa of Legal Aid Board were the lawyers having conduct of the matter on behalf of the Respondents. That Messrs Kangombe & Associates exhibited a list, in their affidavit in support, which

showed that their firm was representing only 48 of the 167 Respondents. That therefore the Legal Aid Board was still Counsel on record for all the drivers, particularly that the Legal Aid Certificate has never been withdrawn by the Director of Legal Aid. At the time that the North Star Logistics arrangement was concluded with the parties into a Consent Order, the Respondents were represented by Legal Aid Board.

3.21 The deponent further denied the allegation that the Consent Order was fraudulent and illegal and maintained that 3 of the Respondents, namely: Martin Ntambo, Tichaona Kandororo and Ackim Mupindura, with whom the Consent Order was entered, had written confirming that they had not engaged Messrs Kang'ombe & Associates.

3.22 That the Appellants had tabulated the benefits due to the Respondents and offered to pay them, but they had disputed their calculations and made astronomical claims which are contested and yet to be adjudicated upon. That in the meantime, the Court has delivered a Ruling ordering the 1st Appellant to pay into Court a total sum of K9,167,667.28, being benefits and allowances and that the Hon Judge Banda was yet to adjudicate on the remaining claims.

3.23 The deponent further stated that the trucks, trailers and cargo which have been the subject of this Court's ex-parte Order for stay are not owned by the 1st Appellant who is the Respondents'

employer, and it is therefore unfair to stop all the trucks, trailers and cargo from exiting Zambia as they are merely transiting through Zambia and the value of the trucks, trailers and cargo far exceeds the purported claims.

3.24 It was further stated that North Star Logistics (NSL), the clients of the 1st and 2nd Appellants, were the owners of the trucks, trailers and cargo and have gravely been inconvenienced and suffered financial losses which include, daily late exit penalties payable to Zambia Revenue Authority at K900 per truck per day since 8th November 2021, parking fees at K70 per truck per day, transit load fees and demurrage.

3.25 The deponent also contended that any further delay to exit Zambia is prejudicial to the owners as most of their drivers are foreigners who have no immigration permits to stay in Zambia, and are not authorized customs carriers to remain in possession of trucks, trailers and cargo which are in transit.

4.0 **DECISION OF THE COURT BELOW**

4.1 The Summons for Order for Stay of execution of the Consent order filed under Cause no. IRC/LK/204/2022 was initially heard ex-parte before Judge Mwansa (shown at page 166 of ROA). An ex-parte order was granted on 21st March 2022 (page 160 of ROA).

- 4.2 By that decision, the learned Judge ordered and directed that execution of the Consent Order and Consent Judgment dated 10th March 2022 executed under cause number COMP/IRD/LK/684/2021 be pending hearing and determination of the matter. The Ex-parte Order was filed under cause number 2022/HP/0408 in the Principal Registry of the High Court.
- 4.3 The application for a stay of execution was heard inter-parte before the Hon. Mwansa, J. At that hearing, the Complainants (Respondents herein) were represented by Mr. M. E. Siwale of Messrs Kang'ombe & Associates, while the 1st and 2nd Respondents, (1st and 2nd Appellants herein) were represented by Mr. G. Pindani of Messrs Chonta, Musaila and Pindani Advocates. The Legal Aid Board, who were the 3rd Respondent in that action under cause number ILR/LK/204/2022, were represented by Ms. J. Mutende.
- 4.4 By the ruling of Mwansa, J of 21st April 2022 made under cause number COMP number IRC/LK/204/2022, the learned Judge held that, *“Now it is clear for all to see that there is a problem here. It is thus proper to stay the Consent Order and Consent Judgment so that the fraud alleged can be proved. I therefore affirm the exparte stay of execution earlier made. And further order that this matter may properly be dealt with in one cause. So, I order that this be consolidated with COMP/IRD/LK/684/2021 and be heard by my brother Judge having conduct of that cause.”*

5.0 THE APPEAL

5.1 Being dissatisfied with the ruling of the lower Court of 21st April 2022, the 1st and 2nd Appellants appealed to this Court by way of Notice of Appeal and Memorandum of Appeal of 6th May 2022 advancing 3 grounds of appeal, namely:

- (i) That the learned Judge in the Court below erred both in law and fact when he rendered a ruling which did not meet the benchmark of the judgment and/or a ruling.**
- (ii) That the learned Judge in the Court below erred both in law and fact when he confirmed the exparte stay of execution earlier made without adjudicating on all the issues raised by the Appellants and the 168th Respondent on abuse of Court process and/or multiplicity of actions engaged in by the 1st to 167th Respondents inter alia contrary to the law.**
- (iii) That the learned Judge in the Court below erred both in law and in fact when he failed to restrict and/or confine the order of stay of execution to a few of the trucks whose value is equivalent to the amount claimed by the 1st to 167th Respondents and not on all the trucks, trailers and cargo whose value by far surpass the 1st to 167th Respondents' claims to mitigate business losses inter alia.**

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

- 6.1 The Appellants filed their heads of argument on 6th July 2022. In the first ground of appeal, counsel argued that the ruling of the learned Judge in the lower Court did not meet the benchmark of a ruling. Counsel cited the case of **Zambia Telecommunications Company Limited v Aaron Mweene Mulwanda & others**¹ where the Supreme Court set out the essential elements of every judgment. Counsel also called in aid the case of **Minister of Home Affairs, Attorney General v Lee Habasonda**² where the Supreme Court of Zambia gave guidance on additional elements of a judgment.
- 6.2 Counsel submitted that a close review of the ruling of the lower Court of 21st April 2022, shown at pages 13-16 of the ROA reveals that the Judge did not segment his ruling as dictated by the cited cases. Counsel further argued that the lower Court ought to have summarized the averments of the parties, and made findings of fact and drawn conclusions. However, the Court did not do so, according to counsel.
- 6.3 Further submissions were that the learned Judge ought to have previewed the prospects of the Respondents succeeding in the main matter before confirming the stay of execution of the Consent Order, especially considering the seriousness of the matter and the potential financial losses.

- 6.4 In relation to ground 2, counsel argued that the Court ought to have adjudicated upon the issues raised by the Appellants regarding the abuse of Court and/or multiplicity of actions engaged in by the Respondents before confirming the ex-parte stay of execution. Counsel cited the cases of **Zulu v Avondale Housing Project Limited**³ and **William Harrington v Hon. Dora Siliya and The Attorney General**⁴ to aid their contention.
- 6.5 Counsel submitted that the 1st and 2nd Appellants had raised the issue of abuse of the Court process and the multiplicity of actions at paragraph 13 of the affidavit in opposition appearing at page 169 of the ROA. Counsel argued that the same application had been made earlier under cause number COMP/IRD/LK/684/2021 before Banda, J but that the learned Judge Mwansa did not address this issue.
- 6.6 Counsel argued that the 1st and 2nd Appellants had also raised the issue of legal representation of the Respondents to the effect that Legal Aid Board had not withdrawn from acting for the Respondents, but the Judge did not address this issue. Counsel further highlighted paragraph 24 of the affidavit in opposition at page 170 of the ROA, wherein the evidence revealed that 3 of the Respondents, namely Martin Ntambo, Tichona Kandororo and Ackim Mupindura had denied engaging Kang'ombe & Associates, but the lower Court did not address this issue and that this was a misdirection on the part of the Judge.

6.7 In relation to ground 3, counsel argued that the learned Judge erred by failing to mitigate business losses when he failed to restrict or confine the stay of execution of the Consent Order to a few of the trucks whose value was equivalent to the amount claimed by the 1st to 167th Respondents and not all the trucks, trailers and cargo whose value far surpassed amounts claimed by the Respondents.

6.8 Counsel contended that the issue of the value of the trucks and cargo was raised at paragraph 29 of the affidavit at page 171 of the Record of Appeal, when the deponent indicated that they were not all owed by the 1st Appellant, who is their employer. Their value was way too high compared to the purported claims by the Respondent.

7.0 **RESPONDENTS' ARGUMENTS IN OPPOSITION**

7.1 The 1st to 167th Respondents filed their Heads of Arguments on 21st December 2022. We have not reproduced these Arguments for the reason that will become apparent in the latter part of this judgment.

8.0 **HEARING OF THE APPEAL**

8.1 The appeal was heard on 17th January 2023. The parties were all represented by counsel as shown earlier.

8.2 The Court was informed that 5 parties had joined the Appeal as Intervenors. Their counsel were placed on record. Counsel for the 1st and 2nd Intervenor notified the Court that their clients had been joined to the action sometime in August 2022 but that the purpose for which his clients had joined was no longer necessary. Counsel therefore applied for the removal of the 1st and 2nd Intervenors from the appeal in accordance with **Order 15 Rule 6 of the Rules of the Supreme Court, White Book (1999 Edition)**. There being no objection from the parties, the Court ordered the removal of the 1st and 2nd Intervenors from the appeal.

8.3 Counsel for the Appellant relied on the Heads of Arguments filed on 6th July 2022 and informed the Court that the Appellant was abandoning ground 3 of the appeal.

8.4 He briefly augmented the arguments by relying on the case of **First National Bank Zambia Limited v Chizmani Investments Limited**⁵ and submitted that in that case, this Court held that: *‘in granting a stay of execution of a consent order or consent judgment, the learned judge ought to preview the cause of action in the statement of claim to ascertain whether it has prospects of success at trial.’*

- 8.5 Counsel for the Appellant argued that in the present case, there were no particulars of fraud in the statement of claim for the Court to have properly ascertained whether there was fraud and who had perpetrated it. The Court's attention was drawn to pages 19 to 24 of the Record of Appeal. Counsel submitted that the grievance of the Respondents was one of an in-house issue between lawyer and client and not of fraud as alleged.
- 8.6 Counsel further submitted that Messrs Legal Aid Board had authority to represent all the 168 Respondents at the time that the Consent Order was entered, as they had never withdrawn their representation in accordance with **Order 67, Rule 6 of the White Book**. Further, that Messrs Kang'ombe and Associates did not provide a schedule of the names or parties that they purported to represent, despite a request having been made to them as shown at pages 185 of the Record of Appeal.
- 8.7 Counsel for the Appellant further drew the Court's attention to the affidavit filed by Messrs Legal Aid Board shown at pages 238 to 265 of the Record of Appeal and submitted that there was no basis for the Court below to have stayed the Consent order. He urged this Court to discharge the Ruling of the lower Court of 21st April 2022.
- 8.8 On the question of costs, counsel stated that he was conversant with the provisions of **Rule 44 of the Industrial and Labour**

Relations Act and decided cases that, each party must bear their own costs in cases that emanate from the Industrial Relations Division. Finally, counsel lamented that the Appellant had not been served with Heads of Argument by the 168 Respondents.

8.9 Counsel for the Respondents argued that he had filed their Heads of Argument on 21st December 2022 but did not have evidence of service of the same on the Appellant's Counsel. Counsel for the Appellant vehemently opposed the Respondent's relying on the said Heads of Argument as they had not been served with the same. He also contended that the said Arguments did not comply with the provisions of **Order 13 Rule 3 of the Court of Appeal Rules** and the judgment of this Court in **Raphael Chisupa v African Banking Corporation Zambia Limited**⁶ where this Court held that Arguments filed without leave should be expunged from the record and that a party is automatically disqualified from being heard viva voce. He urged us to enforce the Rules of the Court and expunge the Respondent's Heads of Argument filed out of time and without leave of this Court.

8.10 Counsel for the Respondents, Mr. Simukonda argued that the Rules of the Court of Appeal are instructive and permit a party to file its Heads of Arguments not less than 14 days before the hearing of the Appeal. According to counsel, since they had filed

their Arguments on 21st December 2022, they were still within the time prescribed by **The Court of Appeal Rules, 2016**.

8.11 On the issue of non-service of the Arguments upon the Appellant's counsel, Mr. Simukonda argued that this was merely a procedural technicality and if they had not served them, the Respondents ought to be given time to serve the documents on the Appellant. He cited **Article 118(2)(e) of the Constitution of Zambia** and argued that according to this constitutional provision, which is supreme, justice is to be dispensed without undue regard to procedural technicalities. He also argued that there would be no prejudice caused to the Appellant by allowing the Respondents' Heads of Argument, as the former could be given sufficient time to review the same. He urged the Court to grant an adjournment of the matter.

8.12 The Appellant's counsel vehemently opposed the application for an adjournment. He also submitted that the Supreme Court has pronounced emphatically on the purpose of the Rules of Court, being the orderly administration of justice and that those who ignore them should face the consequences. He highlighted that in accordance with the Court of Appeal Rules, the Respondents were to file their Heads of Argument within 30 days from the date of receipt of the Record of Appeal and Heads of Argument. He indicated that the Respondents were served with the requisite documentation on 27th July 2022 and the 30 days

period for filing the documents had lapsed without the Respondents' counsel filing the necessary documents. He urged the Court to expunge the documents from the Record and disqualify the Respondents from making any oral arguments into Court.

8.13 We considered the application by counsel for the Appellant to expunge from the record the 1st to 167th Respondents' arguments filed on 21st December 2022 on the ground that they were filed late. We stated that **Order 10 Rule 9 (1) of the Court of Appeal Rules** provides that the Respondent shall file their Heads of Argument within 30 days upon receiving the record of appeal and Appellant's Heads of Argument. Having found that the Record of Appeal was served on the Respondents on 27th July 2022, the Respondents' arguments ought to have been filed not later than 21st August 2022. They were only filed on 21st December 2022, about 4 months later, and without leave of this Court. We found that this was an irregularity.

8.14 We ordered that the 1st to 167th Respondents' Heads of Argument be expunged from the record. We further ordered that in line with previous decisions, the Respondents' counsel would not be permitted to make oral arguments on account of their failure to comply with the Rules of the Court. We also condemned counsel for attempting to mislead the Court on the Rules and arguing that their arguments were filed on time.

9.0 **DECISION OF THIS COURT**

- 9.1 We have carefully considered the evidence on record, the ruling sought to be impugned and the arguments of the respective parties. There were 3 grounds of appeal filed in this appeal. However, the Appellant's counsel abandoned the third ground. We will begin by addressing ground 2 and conclude with ground 1.
- 9.2 The issue that arises in the 2nd ground of appeal is whether the learned trial Judge should have granted a stay of execution of the Consent Order of 10th March 2022 in the circumstances of this case. The Appellants contend that the trial Court erred in confirming the ex-parte order of stay in its ruling of 21st April 2022 without considering all the issues raised before it, particularly, the issue of abuse of Court process anchored on multiplicity of actions by the Respondents.
- 9.3 In addressing this ground of appeal, we begin by examining the Record of Appeal before us. The earlier part of this judgment confirms the background of the matters in contention as reflected in the Record before us. Of interest is the fact that the Consent Order of 10th March 2022 that gave rise to the application for stay of execution in the Court below was endorsed and executed by Banda, J under Cause COMP NO. IRD-LK/684/2021.

- 9.4 The summons to stay execution of the said Consent Order appears to have been filed on 11th or 17th March 2022 under Cause, COMP NO. IRCLK/204/2022. What appears to be the affidavit in support of the said summons was filed under a different cause number being COMP NO. IRCLK/684/2021. The parties in the two causes are the same. The summons are shown at page 166 of the Record of Appeal and the affidavit in support is at pages 174 to 177 of the Record of Appeal.
- 9.5 Further, the evidence on record shows two different sets of affidavits filed in opposition to the summons for stay of execution of Consent Order, as shown at pages 167 to 173 and pages 238 to 250 of the ROA. These were both filed into Court under cause number 2022/HP/0408 on 30th March and 31st March respectively yet also bearing the names of the same parties. The ex-parte Order of stay of execution was issued by Mwansa, J under cause No. 2022/HP/0408 (page 160 of the ROA) and the Ruling of Mwansa, J confirming the ex-parte order was delivered under cause COMP NO. IRCLK/204/2022.
- 9.6 We must add that the dates on the summons and affidavits filed in March 2022 are not perfectly legible and we have had to speculate to make sense of the events as they might have unfolded in the Court below.

- 9.7 Having said the foregoing, we also note that the Court below was fully aware of the possibility of multiplicity of applications as paragraph 13 of the affidavit in opposition of the application in the Court below, shown at page 169 of the Record of Appeal, clearly raised the issue.
- 9.8 The trial Judge recognized this aspect in his ruling of 21st April 2022 although he does not address his mind to the question of the purported multiplicity of actions or applications, he gave a directive in the concluding sentence of the Ruling, shown at page 16 of the Record of Appeal; for consolidation of cause COMP NO. IRC-LK/204/2022 with COMP/IRD-LK/684/2021 to be heard by Banda, J.
- 9.9 In the case of **Kelvin Hang'andu and Company (a Firm) v Webby Mulubisha**⁷ the Supreme Court held that:

“Once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular court. Forum shopping is abuse of process which is unacceptable.”

- 9.10 The apex Court was very clear in that decision and numerous decisions as to its position on abuse of Court process by duplicity of actions and applications. The directive of the

Supreme Court in the above authority is unambiguous that once a matter is before a court, that court should be the only court to adjudicate issues involved in that matter. The Court was instructive that parties must bring all issues in that matter before the same court.

9.11 In the appeal before us, it is evident that the original matter before the lower Court in which a Consent Order was in contention was commenced in the Industrial Relations Division of the High Court under COMP/IRD-LK/684/2021 before Banda, J. A Consent Order was executed between the parties on 10th March 2022. However, the application for a stay of execution of the Consent Order, appears to have been brought under a separate action either 2022/HP/0408 and / or COMP NO. IRC-LK/204/2022 and before Mwansa, J. The said learned Judge proceeded to entertain the application initially ex-parte, and granted an ex-parte order on 21st March 2022 and then inter-partes, and issued a Ruling on 21st April 2022, which is the subject of this appeal. By those decisions, the learned trial Judge stayed a decision (Consent Order of 10th March 2022) of his brother Banda, J under a separate action, contrary to the Kelvin Hangandu case.

9.12 The circumstances under which the application for a stay of execution of the Consent Order was taken before a different Judge of the Court under a separate action are unexplainable.

9.13 It is also clear that the learned trial Judge in the Court below erred by disregarding the issue that was raised about multiplicity of applications. Given the foregoing account of events in the Court below, we are of the firm view that the trial Judge would not have dealt with the application before him had he addressed his mind to the issue raised of multiplicity of actions/applications.

9.14 The learned Judge ought to have referred the application for a stay of execution of the Consent Order to his brother Banda, J for determination, before whom the case originated, and the Consent Order was arose. In the absence of an explanation as to why the application was being brought to a different Court under a different cause number, it was inappropriate for the Judge to have entertained the application. Judges of the High Court have equal jurisdiction and, therefore, it was improper for Judge Mwansa to have granted a stay of execution of a Consent Order issued by Banda, J who was presiding at the time. For the said reasons, the second ground of appeal is successful.

9.15 We now wish to address the issue of the format of the ruling of the trial Court delivered in the Court below as contended in ground 1 of the appeal herein. It is clear that the ruling of the trial Court appealed against lacks structure and coherence. The Supreme Court has guided in the case of **Zambia Telecommunications Company Limited v Aaron Mweene**

Mulwanda and others on the format and elements expected to be contained and captured in decisions of Courts.

9.16 In the above case, the elements of a judgment were outlined as being; ***“an introduction setting forth the nature of the case, an outline of the relevant law applicable to the case to be resolved, an actual application of relevant law to the facts of the case, the remedies or remedy sought in the case and ultimately the order of the Court.”***

9.17 This position has been affirmed in several authorities before and after the aforesaid decision and it is a generally accepted practice even in Courts beyond this jurisdiction. It is expected that in line with the above decision, a ruling will comprise of the said elements or items.

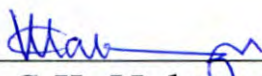
9.18 Given the aforesaid, and a review of the Ruling of the Court of 21st April 2022, we agree with counsel for the Appellants that the Ruling did not meet the benchmark of what is expected. Ground 1 of the appeal is also successful.

10.0 **CONCLUSION**

10.1 Given that both grounds 1 and 2 of the appeal are successful, the Ruling of 21st April 2022 which stays execution of the consent order is hereby set aside.

10.2 We also set aside the order for consolidation of actions as this was made without application or hearing of the parties or consideration of the issues in the matter.

10.2 Given that this case originates from the Industrial Relations Division, we order each party to bear their own costs of this appeal.



C.K. Makungu
COURT OF APPEAL JUDGE



P.C.M. Ngulube
COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE