

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

2020/CCZ/R003

BETWEEN:

YOUJUN ZHUANG
WANG QINGHAI



1ST APPLICANT
2ND APPLICANT

AND

KINGPHAR COMPANY ZAMBIA LIMITED
BUMU GENERAL TRADING FZE

RESPONDENT
INTERESTED PARTY

CORAM: Sitali, Mulenga, Mulonda, JJC on 9th December, 2020 and
10th February, 2021

For the 1st and 2nd
Applicants:

No Appearance

For the Respondent:

Mr. P. Chola of
Lewis Nathan Advocates

For the Interested Party:

Mr. S.K. Simwanza of
Lungu Simwanza and Company

Mr. N. Yalenga of
Nganga Yalenga and Associates

J U D G M E N T

Sitali, JC delivered the Judgment of the Court.

Cases cited:

1. Fred M'membe and Another v Abel Mbozi and Others, Appeal No. 15 of 2019
2. London Ngoma and Others v LCM Company Limited (1999) ZR 75

3. Lusaka West Development Company Limited BSK Chiti (Receiver), Zambia State Insurance Corporation v. Turnkey Properties Limited (199) SJ (SC)
4. Zambia Seed Company v. Chartered International (PVT) Limited SCZ No. of 1999
5. Benjamin Mwelwa v. The Attorney-General, Selected Judgment No. 9 of 2019

Legislation cited:

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia**
2. **The Rules of the Supreme Court 1999 edition**

This is a constitutional reference from the High Court of Zambia at Kabwe made to this Court pursuant to Article 128 (2) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth referred to as the Constitution). The background to this reference according to the 2nd Applicant's affidavit set out on pages 20 to 22 of the record of proceedings is that on 23rd March, 2020, the 1st Applicant, Youjun Zhuang commenced an action against the Respondent, Kingphar Company Zambia Limited, under cause number 2020/HB/015 seeking an order that the Respondent be placed under supervision and for the commencement of business rescue proceedings.

In that action, the 1st Applicant alleged that the Respondent was financially distressed and that it was necessary to place the Respondent under supervision and commence business rescue proceedings in order to rehabilitate the Respondent and enable it to discharge its financial obligations to its creditors. The 1st Applicant further stated that unbeknown to him, the 2nd Applicant, Wang Qinghai, had also filed a petition for the winding up of the Respondent for its failure to pay debts in the High Court at Lusaka under cause number 2020/HPC/165.

On 24th April, 2020, the 1st and 2nd Applicants and the Respondent filed a consent order to consolidate cause number 2020/HPC/165 and cause number 2020/HB/015 before the Hon. Mr. Justice Kamwendo of the High Court at Kabwe. In that order the parties consented that the petitioner under cause number 2020/HPC/165, Wang Qinghai, should appear as the 2nd Applicant in the consolidated matter; that the Respondent be placed under supervision and that business rescue proceedings should commence in respect to the Respondent; and that Lewis Chisanga Moshosho, the court appointed provisional liquidator under

cause number 2020/HPC/165, be appointed as the business rescue administrator of the Respondent company.

The 2nd Applicant alleged that since the commencement of the business rescue proceedings, the shareholders of the Respondent and other affected persons had been forum shopping and had commenced actions at Lusaka under cause numbers 2020/HPC/0268 and 2020/HP/0486 and at Kabwe under cause number 2020/HB/023 before different Courts and different Judges with the same jurisdiction seeking to set aside the court order issued in the action under cause number 2020/HB/015. To support his assertion, the 2nd Applicant referred us to exhibit "WQ1" to his affidavit in support of the application.

The 2nd Applicant further contended that instead of bringing their grievances under cause number 2020/HB/015, the affected persons working collusively together had commenced other actions and interlocutory applications before different Judges intended to frustrate the proceedings in cause number 2020/HB/015 and to question or undermine the authority of Hon. Judge Kamwendo.

He contended that he had been advised by Counsel that the actions commenced before the different Judges had the potential

to cause those Judges to render conflicting decisions on the same subject or issues. The 2nd Applicant further deposed that he had also been advised by Counsel that the said actions interfere with the judicial functions and independence of the Court under cause number 2020/HB/015 in the sense that they seek to challenge the orders given by the Court in that cause as though one High Court Judge is above the other.

The 2nd Applicant concluded by stating that the same affected persons had written to the office of the Chief Justice, the media and the Law Association of Zambia intending to intimidate the Hon. Judge Kamwendo and the Judiciary as a whole as evidenced by exhibit "WQ2" to his affidavit.

On 5th June, 2020, the 2nd Applicant filed ex parte summons seeking an order to stay interlocutory proceedings in cause number 2020/HB/015 before Hon. Judge Kamwendo and refer the matter to this Court for the determination of the following constitutional issues:

- i. Whether or not the actions and conduct of the affected persons as shown in the affidavit in support amount to interference with or undermine the judicial functions

and or independence of a Judge or the Judiciary contrary to Article 122 of the Constitution;

- ii. Whether or not the High Court sitting at Lusaka under causes number 2020/HPC/0268, 2020/HP/0486 and 2020/HPC/0336 before different Judges and the High Court sitting at Kabwe before another Judge under cause number 2020/HB/023 can properly hear and determine those causes of action considering that each of those causes interferes with the performance of the judicial function by a Judge sitting at Kabwe under causes number 2020/HB/015 and 2020/HPC/165 as consolidated contrary to Article 122 (2) of the Constitution; and
- iii. Whether or not the supervisory jurisdiction of the High Court includes supervision of one High Court Judge by another High Court Judge contrary to Article 134 (b) of the Constitution.

On 12th June, 2020, Judge Kamwendo in a ruling of that date granted the order to stay all interlocutory proceedings before him and referred the matter to this Court for determination of the questions raised.

In the skeleton arguments filed by the Applicants on 22nd October, 2020, in support of the constitutional reference, the Applicants argued first, that the conduct of the affected persons, Bumu General Trading FZE and the shareholders and directors of the Respondent Company, of commencing various actions to challenge the consent order made under cause number 2020/HB/015 amounts to interference with or undermine the judicial functions and independence of Judge Kamwendo who is presiding over that action. They contended that the affected persons have further reported Judge Kamwendo to the Chief Justice of Zambia and to the media over his alleged conduct in presiding over cause number 2020/HB/015.

They submitted that the provisions of Article 122 (2) of the Constitution prohibit any person from interfering with the performance of a judicial function by a Judge. The Applicants cited the learned authors of Black's Law Dictionary 8th edition who define 'interference' as:

- “1. The act of meddling in another's affair. 2. An obstruction or hindrance...”**

They further cited the authors of the Concise Oxford English dictionary who define the word “interfere” to mean:

“Prevent from continuing or being carried out properly.”

The Applicants submitted that the acts of the affected persons of reporting Judge Kamwendo to the Chief Justice and the media and of commencing various actions before different High Court Judges seeking to injunct and or stop Judge Kamwendo from hearing and determining cause number 2020/HB/015 amount to interference with the performance of a judicial function by a Judge as they are meant to obstruct or prevent the Judge from performing his judicial functions properly. They contended that these actions by the affected persons are illegal in terms of Article 1(2) of the Constitution.

On the basis of the foregoing, the Applicants pray that this Court should hold that the acts of the affected persons which are meant to obstruct or prevent Judge Kamwendo from properly performing his judicial functions as bestowed upon him by the Constitution amount to interference contrary to Article 122(2) of the Constitution and are thus illegal.

The Applicants went on to submit that one High Court judge has no jurisdiction to supervise another High Court Judge. In that regard, they submitted that the Interested Party, Bumu General Trading FZE commenced an action under cause No. 2020/HB/023 in Kabwe before Judge Limbani seeking to set aside the consent order and consequently, the proceedings under cause No. 2020/HB/015 which are active before Judge Kamwendo. This, according to the Applicants, is tantamount to one High Court Judge supervising another High Court Judge in the performance of his or her judicial functions. They submitted that Judge Kamwendo while presiding over cause number 2020/HB/015 placed the Respondent Company under supervision and ordered the commencement of business rescue proceedings pursuant to the provisions of section 23 of the Corporate Insolvency Act No. 9 of 2017. They argued that section 24 of that Act clearly provides that business rescue proceedings commence when the Court orders that such proceedings be commenced and further that, the business rescue proceedings terminate when *inter alia* the Court orders that such proceedings be terminated.

The Applicants submitted that section 24 of the Act entails that once a Court orders that a company be placed under supervision and that business rescue proceedings be commenced, it is that Court which is seized with the supervision of those business rescue proceedings until the business rescue proceedings are terminated. They contended that another High Court Judge cannot come in and start supervising the High Court Judge on how to conduct the business rescue proceedings or set aside the order made by the High Court Judge who commenced business rescue proceedings.

They submitted that in the present case, while Judge Kamwendo ordered the placement of the Respondent Company under supervision and to commence business rescue proceedings under cause number 2020/HB/015, Judge Limbani under cause number 2020/HB/023 is presiding over a matter seeking to set aside an order made by Judge Kamwendo placing the Respondent Company under supervision and commencing business rescue proceedings. They argued that in essence, Judge Limbani is seized with proceedings which seek to supervise Judge Kamwendo in the performance of his judicial function with respect to the business

rescue proceedings of the Respondent Company which are active and ongoing. The Applicants contended that this is contrary to Article 122 (2) of the Constitution; further that the act is illegal in terms of Article 1 (2) of the Constitution.

They submitted that although Article 134 (b) of the Constitution gives the High Court appellate and supervisory jurisdiction, the supervisory jurisdiction is exercisable by the High Court over subordinate courts and does not extend to one High Court Judge supervising another High Court Judge as all High Court Judges have the same jurisdiction.

The Applicants therefore pray that this Court orders that one High Court Judge cannot supervise another High Court Judge and that the continued hearing and determination of cause number 2020/HB/023 by Judge Limbani amounts to supervision of and interference with the judicial functions of Judge Kamwendo under cause number 2020/HB/015 contrary to the Constitution. They further pray that this Court should order that the proceedings under cause number 2020/HB/023 before Judge Limbani be heard and determined *de novo* by Judge Kamwendo who signed

the consent order which is being impugned under cause number 2020/HB/023.

On 30th October, 2020 the Interested Party filed skeleton arguments in opposition to the Applicants' constitutional reference. The Interested Party stated that the background to this reference, is that the 2nd Applicant in 2018 commenced an action against the Respondent under cause number 2018/HPC/0437 claiming that he was owed a sum of US\$1,700,000.00. He presented before the Lusaka High Court a purported bank transfer executed in Hong Kong as proof of his claim.

In a ruling delivered on 18th December, 2018 the Lusaka High Court stated *inter alia* that the said bank transfer could not be relied upon to prove the Respondent's indebtedness to the 2nd Applicant as it was not authenticated. The Interested Party stated that upon realizing that the matter was not proceeding in his favour, the 2nd Applicant filed a petition to wind up the Respondent Company under cause number 2020/HPC/165. He again relied on the bank transfer which was rejected by the Court in cause number 2018/HPC/0437. Judge Musona appointed Lewis

Chisanga Mosho as provisional liquidator pursuant to the 2nd Applicant's prayer in cause number 2020/HPC/165.

The Interested Party stated that while the winding up action was still before Judge Musona, the 1st Applicant (in person) commenced business rescue proceedings in Kabwe under cause number 2020/HB/015. In that action, he claimed that the Respondent owed him US\$50,000.00 which debt came about on account of the assignment to him of that sum by the 2nd Applicant from the US\$1,700,000.00 the Respondent allegedly owed to the 2nd Applicant.

Subsequently, the 1st Applicant appointed the Advocates who had represented the 2nd Applicant in the matters before the Lusaka High Court in both cause number 2018/HPC/0437 and cause number 2020/HPC/165 as his Advocates.

The 1st and 2nd Applicants and the Respondent then executed a consent order to consolidate causes number 2020/HPC/165 and 2020/HB/015 into one matter to be heard before Judge Kamwendo; place the Respondent under business rescue supervision; and appoint Lewis Chisanga Mosho as the business rescue administrator of the Respondent.

Counsel submitted that the Interested Party commenced proceedings to challenge the consent order in cause number 2020/HB/015 alleging a myriad of irregularities including fraud, first, in the manner that cause number 2020/HB/015 was placed on the cause list; secondly, in the conduct of the 1st and 2nd Applicants in executing the assignment of debt after the Respondent had been placed in liquidation and thirdly, on account that the law does not support or provide for a consolidation of a winding up matter after a business rescue action has been commenced.

Counsel submitted that while the matters in cause number 2020/HB/015 were being heard, the 1st and 2nd Applicants applied for a stay of proceedings so that the matter could be referred to this Court to determine the supposed constitutional issues that had arisen.

It was submitted that although in their skeleton arguments filed before this Court on 22nd October 2020, the 1st and 2nd Applicants had posed three questions for determination by this Court, Counsel for the Interested Party would deal with all the three questions as one argument. Counsel went on to state that

the issue before Judge Limbani of the Kabwe High Court under cause number 2020/HB/023 was to challenge the consent judgment executed by the 1st and 2nd Applicants and the Respondent based on the reasons stated. Counsel submitted that the question to be determined by this Court is whether by commencing the action in cause number 2020/HB/023 to challenge the consent order, the Interested Party could be said to have-

- (a) interfered with or undermined the judicial functions and independence of the judiciary; or
- (b) caused the High Court sitting at Lusaka under causes number 2020/HPC/0486 and 2020/HPC/0336 and at Kabwe under cause number 2020/HB/023 to interfere with the judicial functions of the Judge sitting at Kabwe under cause number 2020/HB/015.

Counsel submitted that the Interested Party was only party to matters arising from the Kabwe High Court and that the other causes before the Lusaka High Court did not concern the Interested Party and that in fact they do not form the basis of the constitutional reference.

It was submitted that a consent judgment by nature is like a contract and that only parties to the consent judgment can apply to have it set aside on the same grounds that would lead to a contract being declared invalid. That after being joined to the proceedings in cause number 2020/HB/015, the Interested Party assumed the *locus standi* to challenge the consent judgment even though it was not party to its execution. That the Court of Appeal recently in the case of **Fred M'membe and Another v Abel Mbozi and Others**⁽¹⁾ in a matter similar to this case and involving the same insolvency practitioner stated that:

“As regards the procedure relating to setting aside or impeachment of a consent judgment, the only means open to a party to set aside a consent judgment or order is by commencing a fresh action for that purpose. See paragraph 17A-23 of the Rules of the Supreme Court volume 2 Halsbury’s Laws of England paragraph 1672 and the case of Zambia Seed Company v Chartered International (PVT) Limited.”

It was submitted that the Court observed that the critical or decisive issue for their consideration in that case was whether a person or entity that was not a party to the consent judgment could commence a fresh action to set it aside and concluded that

only parties to an action or proceedings or executed order can set aside a consent judgment or order by commencing a fresh action.

Counsel submitted that by joining the proceedings in 2020/HB/015, the Interested Party which was not a party to the consent judgment became a party to the proceedings and could therefore apply to have it set aside as it did in the Court below. Counsel also cited the case of **London Ngoma and Others v LCM Company Limited**⁽²⁾ in support and submitted that while that decision is not binding on this Court, it is nonetheless good law.

Counsel further cited the case of **Lusaka West Development Company Limited BSK Chiti (Receiver) Zambia State Insurance Corporation v Turnkey Properties Limited**⁽³⁾, wherein the Supreme Court observed that:

“A consent judgment could only have been allowed to be withdrawn if there were proper grounds upon which the validity of any contract could be impugned such as fraud, mistake or illegality.”

Counsel submitted that it is trite law that where a party contests the execution of a consent judgment, the only recourse open to such a party is to commence a fresh action and usually before another Court. It was argued that this is because

paragraph 17A-23 of volume 2 of the White Book 1999 edition provides that:

“A judgment by consent is binding until set aside and acts as an estoppel...a Court has no power to vary a consent judgment or order made previously in that Court and therefore the only means open to a party to set aside a consent judgment or order on the ground of fraud or mistake is to bring a fresh action for that purpose.”

That this position was upheld by the Supreme Court in the case of **Zambia Seed Company v Chartered International (PVT) Limited**⁽⁴⁾ wherein the Court said that:

“By law the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment.”

Counsel submitted that as paragraph 17A-23 of the White Book provides, the Court in 2020/HB/015 was *functus officio* as it could not vary its own consent judgment.

Counsel submitted that since the Interested Party followed the laid down procedure by which a consent judgment or order can be challenged, it cannot be said to have interfered with Judge Kamwendo's performance of his judicial functions.

Counsel prayed that this Court finds that this was merely an attempt by the Applicants to prevent the Interested Party from

lawfully contesting their consent judgment and that no constitutional issue arises at all. The Interested Party prayed for costs.

We have considered the questions referred to us for determination as well as the submissions made by the Applicants and the Interested Party in support of and in opposition to the constitutional reference, respectively. The first question raised by the Applicants is whether or not the actions and conduct of the affected persons, as shown in the affidavit in support of the application to refer the matter to this Court, amount to interference with or undermine the judicial functions and independence of a Judge or the Judiciary contrary to Article 122 of the Constitution. The issue we have to determine in respect of this question is whether the commencement of a fresh action under cause number 2020/HB/023 by the Interested Party to challenge the consent order executed by the Applicants and the Respondent under cause number 2020/HB/015 amounts to interference with the judicial functions of the Judge presiding over the business rescue proceedings in the consolidated action under cause number

2020/HB/015 contrary to the provisions of Article 122 (2) of the Constitution.

In determining this issue, we have examined the provisions of Article 122 (1) and (2) of the Constitution which provide for the functional independence of the Judiciary in the following terms:

- “(1) In the exercise of the judicial authority, the Judiciary shall be subject only to this Constitution and the law and not be subject to the control or direction of a person or an authority.**
- (2) A person and a person holding a public office shall not interfere with the performance of a judicial function by a Judge or judicial officer.”**

The provisions of Article 122 (1) and (2) of the Constitution which we have cited above are clear and unambiguous. Clause (1) of Article 122 clearly stipulates that in the performance of its judicial authority, the Judiciary will be guided only by the Constitution and the law and will not be controlled or directed by any person or authority. Further, clause (2) of Article 122 prohibits a person or a person holding public office from interfering with a Judge or judicial officer in the performance of their judicial functions. This leads us to consider what judicial independence entails.

In the case of **Benjamin Mwelwa v The Attorney-General**⁽⁵⁾ we held that the importance of enshrining judicial independence in the Constitution is that doing so guarantees that Judges and judicial officers are free to decide cases impartially, in accordance with the law and the evidence before them, without fear of interference, control or improper influence from any person or authority. We further cited the observation of the learned authors of **Halsbury's Laws of England**, Fifth Edition, volume 20 at paragraph 130 on page 136 wherein they state that:

“The independence of the judiciary is essential to the rule of law and to the continuance of its own authority and legitimacy. It involves the impartiality, and appearance of impartiality, of judges; and the freedom of judges from political and other pressures in their determination of the law and adjudication of disputes.”

In the present case, the Applicants allege that the Interested Party, Bumu General Trading FZE, has interfered with the judicial functions of Judge Kamwendo by commencing a fresh action under cause number 2020/HB/023 to challenge the consent order signed by the parties under cause number 2020/HB/015 by which the Respondent was placed under supervision and subjected to

business rescue proceedings in the consolidated action before Judge Kamwendo. The Applicants stated that the Interested Party is an affected party with regard to the business rescue proceedings before Judge Kamwendo. They also confirmed that the other persons whom they allege commenced fresh actions before different judges of the Lusaka High Court are shareholders and directors in the Respondent Company and that they were not party to the consent order by which the Respondent Company was placed under the business rescue proceedings pursuant to the provisions of the Corporate Insolvency Act No. 9 of 2017.

It is settled law that an interested party can apply to set aside a consent order or judgment entered into by parties to an action and that an interested party who was not a party to the consent order or judgment can apply to set aside that consent order or judgment upon being joined to the proceedings as the Supreme Court held in the case of **London Ngoma and Others v LCM Company Limited**⁽²⁾ which was cited by counsel for the Interested Party.

It is our considered view that the factual basis of this case does not reveal that the Interested Party interfered with Judge

Kamwendo's performance of his judicial functions when he commenced a fresh action under cause number 2020/HB/023 to set aside the consent order executed by the Applicants and the Respondent under cause number 2020/HB/015. Further, the Applicants have not demonstrated how the Interested Party has interfered with Judge Kamwendo's freedom to impartially adjudicate and determine the issues under cause number 2020/HB/015 based on his interpretation of the law and the evidence before him.

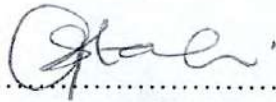
Furthermore, the Applicants have not demonstrated how the shareholders and directors of the Respondent Company, whom they did not name, by commencing actions in the Lusaka High Court in causes number 2020/HPC/0268 and 2020/HP/0486, respectively, and whose details they have not stated, have interfered with the Judge's freedom to impartially adjudicate and determine the issues under the consolidated action under cause number 2020/HB/015 in the Kabwe High Court. The first question raised by the Applicants therefore has no merit and is dismissed.

The second question raised by the Applicants is whether or not the High Court sitting at Lusaka under causes number 2020/HPC/0268, 2020/HP/0486 and 2020/HPC/0336 before different Judges and the High Court sitting at Kabwe before another Judge under cause number 2020/HB/023 can properly hear and determine those causes of action considering that each of those causes interferes with the performance of the judicial function by a Judge sitting at Kabwe under causes number 2020/HB/015 and 2020/HPC/165 as consolidated contrary to Article 122 (2) of the Constitution. Since we have found that the Applicants have not demonstrated that the actions of the Interested Party and any other shareholder and director of the Respondent Company in commencing fresh actions have interfered with the freedom of the Judge sitting at the Kabwe High Court to impartially adjudicate the issues in cause number 2020/HB/015, this question as well as the third question which are both related to the first question are otiose. It will therefore not be necessary for us to consider them.

In sum, we hold that the Applicants have not made out their case that the Interested Party and other shareholders and

directors of the Respondent Company interfered with the judicial functions of the Judge adjudicating over the issues under cause number 2020/HB/015 by commencing their respective actions or that their actions are contrary to the provisions of Article 122 (2) of the Constitution.

The reference therefore has no merit. We order that the record be returned to the Court that sent it. Each party will bear their own costs.



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A. M. SITALI
CONSTITUTIONAL COURT JUDGE



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M.S. MULENGA
CONSTITUTIONAL COURT JUDGE



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P. MULONDA
CONSTITUTIONAL COURT JUDGE