

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 104 OF 2021

HOLDEN AT LUSAKA

*(Civil Jurisdiction)*

IN THE MATTER OF: ESTATE OF THE LATE ERNEST JOHN VAN LEEVE

IN THE MATTER OF: SECTIONS 4(1), 5, 6(A), 7(e), 15(1), 6(1), 19(1) (c), 29, 31, 42(b) (c) AND 43 OF THE INTESTATE SUCCESSION ACT CHAPTER 59 OF THE LAWS OF ZAMBIA

BETWEEN:

STELLA GODDARD

CLINTON ERNEST GODDARD

NADIA MARGRET GODDARD

AND

JEAN BWALE SINYOKOSA (*Sued in her capacity as the Administratrix of the estate of the late Ernest John Van Leeve*)

1<sup>st</sup> APPELLANT

2<sup>nd</sup> APPELLANT

3<sup>rd</sup> APPELLANT

RESPONDENT



CORAM: Siavwapa JP, Chashi, and Sichinga JJA

ON: 21<sup>st</sup> March and 26<sup>th</sup> April 2023

For the Appellants: N. Chila-Matowe (Mrs) and J.N. Hara, Messrs Muya and Company

For the Respondent: S. Namusamba (Ms), Messrs Shamwana and Company

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## J U D G M E N T

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CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. *Brenda Muzyamba v Martha Muzyamba Sinabbomba & Others – SCZ Appeal NO. 11 of 2019*

2. *Shell & BP Zambia Limited v Conidaris and Others* (1975) ZR, 174
3. *American Cynamid Company Limited v Ethicon Limited* (1975) AC,396
4. *Communications Authority v Vodacom Zambia Limited* (2009) ZR 196
5. *Ubuchinga Investment Limited v Tecklenicaal Menstab and Another – SCZ Judgment No. 25 of 2014*
6. *Kearney and Company v Taw International Leasing Corporation* (1978) ZR 329
7. *Finsbury Investments Limited v Antonio Ventriglia and Another – SCZ Appeal No 48 of 2016*
8. *Stannard v Vestry of St.Giles* (1882) 20 CLD

**Legislation referred to:**

1. *The Companies Act, No. 10 of 2017 of the Laws of Zambia*
2. *The Intestate Succession Act, Chapter 59 of the Laws of Zambia*

**Rules referred to:**

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Court of Appeal Rules, Statutory Instrument No. 65 of 2016*

## **1.0 INTRODUCTION**

1.1 This is an interlocutory appeal against the Ruling by Honourable Madam Justice MC Mulanda delivered on 8<sup>th</sup> February, 2021.

1.2 In the said Ruling, the learned Judge refused to grant the Appellants, who were the applicants in the court Below, an order for an interlocutory injunction.

## **2.0 BACKGROUND**

2.1 The Appellants commenced an action in the High Court at Ndola on 17<sup>th</sup> April, 2020, against the Respondent seeking the following reliefs:

- (i) A declaration that Clinton Ernest Goddard and Nadia Margaret Goddard are beneficiaries to the estate of the late Ernest John Van Leeve and are entitled to 14.6% portion of the shares that were held by their late father in Rephidim Mining Supplies and Technical Services Limited**
- (ii) An Order appointing the Appellant as the administratrix of the estate of the late Ernest John Van Leeve**
- (iii) An Order revoking the Order of appointment as administratrix of the estate of the late Ernest John Van Leeve that was granted to the Respondent by the Kapiri Mposhi Local Court**

- (iv) An Order compelling the Respondent to reveal the full extent of the estate and to render an account of the said estate**
- (v) An Order compelling the administratrix and or the appointed co-administratrix to distribute the estate amongst the beneficiaries**
- (vi) Any other relief the court may deem fit**
- (vii) Costs**

2.2 According to the 1<sup>st</sup> Appellant, she had an intimate relationship with the late Ernest John Van Leeve (Leeve), out of which the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were born. Leeve also had two children from his earlier marriage and two from the Respondent, who was not married to him. That in all, Leeve was survived by six children.

2.3 That part of Leeve's estate comprised of 2,749 shares in Rephidim Mining Supplies and Technical Services Limited (Rephidim Mining). The 1<sup>st</sup> Appellant deposed in the court below that, the Respondent, on 11<sup>th</sup> March 2019, obtained an Order of appointment as

administratrix of the estate from Kapiri Mposhi Local Court and subsequently transmitted all the shares into her name without the consent of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. That the shares are wrongly held by her and ought to be distributed to the beneficiaries.

2.4 Attendant to the originating summons, the Appellants took out an application for an Order of interlocutory injunction and were granted an *ex parte* Order pending *inter partes* hearing. The Appellants sought to restrain the Respondent from holding herself out as majority shareholder in Rephidim Mining and exercising rights and benefits that accrue to a majority shareholder, hold meetings in the purported capacity as shareholder and making decisions that affect Rephidim Mining in any manner whatsoever. Further, from disposing of the 2,749 shares.

2.5 In opposing the application for an injunction, the Respondent deposed that, Leye only had four (4) children, of which the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were not and that therefore they have no interest in the estate

2.6 According to the Respondent, the shares devolved and were transferred to her after obtaining an Order of appointment as administratrix, in accordance with Section 190 (2) (b) of **The Companies Act No. 10 of 2017**<sup>1</sup>, which provides a legal right for a personal representative to become a shareholder.

### **3.0 DECISION OF THE COURT BELOW**

3.1 After considering the affidavit evidence and the arguments, the learned Judge noted that the principles governing the grant of an injunction are well settled. That these are as follows:

- (i) Whether the applicant would suffer irreparable injury which cannot adequately be compensated by damages*
- (ii) Whether there is a serious triable question and its prospects of success at trial*
- (iii) Whether the balance of convenience is in his favour.*

3.2 The learned Judge then went on to consider Section 24 of **The Interstate Succession Act**<sup>2</sup> and the case of

**Brenda Muzyamba v Martha Muzyamba & 21 Others<sup>1</sup>**  
and Section 190 (2) (b) and (4) of **The Companies Act,  
No. 10 of 2017<sup>1</sup>** and concluded that the Appellants had  
demonstrated that there is a serious question to be  
tried.

3.3 On the issue of whether damages can be an adequate  
remedy, the learned Judge, after considering the  
originating summons and affidavit in support, made a  
finding that, what the Appellants were seeking was  
clearly quantified by the Appellants themselves.  
Consequently, the learned Judge was of the considered  
view that the Appellants would not suffer irreparable  
damage if they were not granted an Order for an  
interlocutory injunction as they can adequately be  
compensated by damages.

3.4 The learned Judge further found that the balance of  
convenience tilted in favour of the Respondent, who  
legally held the shares which were transferred to her by  
operation of law on behalf of the beneficiaries of the  
estate.

3.5 As regards the argument that the Respondent may dispose of the shares of the deceased to the detriment of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants, the learned Judge opined that the argument had no merit because the administratrix may be called upon any time by a court to render an account for the administration of the estate, as one of the reliefs being sought is an Order to compel the Respondent to render an account of the estate in accordance with the Section 19 (1) (c) (i) and (ii) of **The Interstate Succession Act<sup>2</sup>**.

#### **4.0 THE APPEAL**

4.1 Dissatisfied with the Ruling, the Appellants have appealed to this court advancing one ground of appeal couched as follows:

**“The court erred in law and fact when it held that the Appellants will not suffer irreparable damage if they are not granted an Order of interlocutory injunction as they can adequately be compensated by damages.”**



## **5.0 ARGUMENTS IN SUPPORT OF THE APPEAL**

- 5.1 The Appellants made reference to **Order 27/1 of The High Court Rules<sup>1</sup> (HCR)** and submitted that the Appellants had demonstrated the possible dangers that would occur if the Respondent was not restrained from dealing with the shares and therefore, the court below should have exercised its discretionary authority of granting the injunction as prayed.
- 5.2 Our attention was drawn to the cases of **Shell & BP v Conidaris and Others<sup>2</sup>** and **American Cynamid Company Limited v Ethicon<sup>3</sup>** and submitted that the Appellants have sufficient interest to apply to be administratrix and also to protect their interest. That if the Respondent continues to hold herself out as the majority shareholder and administer the shares in that capacity on the basis that she will possibly render an account once asked to do so, creates a serious possible risk of irreparable injury, which will therefore, render the whole action nugatory and academic.
- 5.3 On the issue of irreparable injury, we were referred to the case of **Communication Authority v Vodacom**

**Zambia**<sup>4</sup> and submitted that, the situation being prevented is that of stopping the Respondent from administering shares forming part of the estate, without taking into account all the interests of the beneficiaries of the estate. That a possible irreparable injury would be in an instance where the Respondent decides to dispose of or sell the shares to a third party which might not be in the interest of the Appellants. It was further submitted that the Appellants interest cannot be remedied by compensation or an order to account in case she decides to dispose of the shares.

## **6.0 RESPONDENTS ARGUMENTS IN OPPOSITION**

- 6.1 In response to the sole ground of appeal, the Respondent noted that the gravamen of the Appellant's argument is that, there are possible damages of irreparable injury to their alleged interest in Lieve's shares if the Respondent is not restrained from dealing with the shares before determination of the main matter.
- 6.2 The Respondent submitted that, the power to grant an interlocutory injunction is at the discretion of the court

and the power should be exercised reasonably, equitably and judiciously. Reliance in that respect was placed on the case of **Ubuchinga Investment Limited v Tecklenicaal Menstab and Another**<sup>5</sup> and submitted that the learned Judge took into account all the relevant matters in considering whether or not an order for an interlocutory injunction should be granted.

- 6.3 The Respondent submitted that irreparable injury means injury which is substantial and can never be adequately atoned for by damages; not injury which can possibly be repaired. According to the Respondent, the argument by the Appellants that if the Respondent continues to hold herself out as major shareholder and administratrix, on the basis that she will possibly render an account of the said shares, once asked to do so, creates a serious possible risk of irreparable injury that might occur to the Appellants' interest, therefore rendering the whole action nugatory and an academic exercise is self-defeating.
- 6.4 That the Appellants' argument not only confirms that there will be a way to quantify any loss that might

possibly be suffered, but also confirms that there is a mode of accountability in relation to the manner in which the Respondent conducts herself as shareholder and administratrix. It was contended that the Appellant has failed to show the nature of irreparable damage that they are likely to suffer in spite of the vehement suggestion that possible damages would occur if the Respondent is not restrained.

- 6.5 The Respondent drew our attention to the fact that, since 2011 when Lieve passed away, the Appellants did not see fit to take interest in the estate. According to the Respondent, that confirms that any damage that they may suffer will not only be quantifiable, but will be adequately compensated, (most assuredly capable of being asked for in damages).
- 6.6 The Respondent drew our attention to the Appellants' arguments on the issue of balance of convenience and submitted that the appeal is not based on that. The Respondent cited the case of **Kearney and Company v Taw International Leasing Corporation**<sup>6</sup> where the Supreme Court stated as follows:

***“The Court in deciding an appeal shall not be confined to the grounds put forward by the appellant, provided that the Court shall not allow an appeal on any ground not stated in the memorandum of appeal.”***

6.7 The Respondent, premised on the aforestated, submitted that we should not permit the Appellants to advance arguments not anchored on any ground of appeal in the memorandum of appeal.

6.8 The Respondent then drew our attention to **Section 190(2)(b) of the Companies Act<sup>1</sup>**, which states as follows:

***“...(2) In the case of death of a shareholder of a company –***

***...***

***(b) Personal representative of the deceased where the deceased was a sole holder or last survivor of joint holders; shall be the only person recognised by the company as having title to the deceased’s interest in the shares.”***

6.9 According to the Respondent, the Appellants do not deny that the Respondent obtained letters of administration and registered her interest as a shareholder. That under Section 19(1)(b) and (c) (ii) of **The Intestate Succession Act<sup>2</sup>**, the Respondent is required to effect distribution of the estate in accordance with the rights of the person interested in the estate under the Act and when required by the Court either on its own motion or on an application from an interested party, an administrator should render to the Court an account of the administration of the estate.

## **7.0 APPELLANTS' ARGUMENTS IN REPLY**

7.1 In reply, the Appellants drew our attention to the Supreme Court case of **Finsbury Investment Limited v Antonio Ventriglia and Another<sup>7</sup>** and submitted that, in that case the Supreme Court held that shares are an essential property and if no injunction is granted to maintain the *status quo*, the plaintiff would suffer irreparable injury.

## **8.0 OUR CONSIDERATION AND DECISION**

8.1 We have considered the Ruling being impugned and the arguments by the parties. The sole ground of appeal attacks the holding by the learned Judge that the Appellants will not suffer irreparable damage if not granted an Order for interlocutory injunction, as they can adequately be compensated by damages. This ground of appeal specifically speaks to the learned Judge's refusal to grant the interlocutory injunction on the ground that the Appellants, if not granted the interlocutory injunction, will not suffer irreparable injury which cannot adequately be compensated by damages. It is therefore astonishing that the Appellants have extended their arguments to the issues of balance of convenience, when that is not part of the sole ground of appeal.

8.2 Order 10/9 (2) and (3) of **The Court of Appeal Rules<sup>2</sup>** (**CAR**) states as follows:

**“(2) A memorandum of appeal shall set forth concisely and under distinct heads, without arguments or narrative, the**

**grounds of objection to the Judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively**

**(3) The Appellant shall not thereafter without the leave of the court put forward any grounds of objection other than those set out in the memorandum of appeal, but the court in deciding the appeal shall not be confined to the grounds put forward by the Appellant.”**

8.3 In view of the aforestated and the Supreme Court decision in the **Kearney and Company** case, we agree with the Respondent’s argument to preclude the Appellants from advancing arguments not anchored on the sole ground of appeal as contained in the memorandum of appeal

8.4 Reverting to the sole ground of appeal, a perusal of the originating summons at page 48 of the record of appeal and the affidavit in support, as well as the application



for an interlocutory injunction, shows that the subject matter are the shares in Rephidim Mining which belonged to Leeve as the majority shareholder, which are now being held by the Respondent. The Respondent in her arguments has relied on Section 190 of **The Companies Act**. The said provision provides for transmission of shares by operation of law where the shareholder who was a sole holder or a joint holder of shares dies. In this case, Leeve was not a sole holder or a joint shareholder and neither was the Respondent a surviving joint holder of shares. The evidence on record only shows that he held shares in his name as a majority shareholder. Therefore section 190 (2) (b) of **The Companies Act**<sup>1</sup> which has been heavily relied upon by the Respondent to contend that the shares devolved and were transferred to her by operation of the law is untenable as this provision is not applicable to this matter.

- 8.5 What is clear though and is not in contention is that, the Respondent is holding the shares on behalf of the beneficiaries of the estate pending distribution and not

in her own right. The main fear by the Appellants is that the Respondent may sell or dispose of the shares to the detriment of the beneficiaries. In the view we have taken that the shares are being held on behalf of the beneficiaries, the Respondent has no right to do so and if by any chance she did so, she would be accountable to the estate.

8.6 In the case of **Stannard v Vestry of St Giles**<sup>8</sup>, which was referred to by the learned authors of **Odgers Principles of Pleadings and Practice**<sup>1</sup> at pages 100 and 173 – 174, it was pronounced that whenever an injunction is applied for, it is material to allege that there is reason to apprehend any repetition of the defendants unlawful act. That in such a case, it must be averred that the defendant threatens and intends to repeat the unlawful act unless such an intention can be readily inferred from the nature of the case and the facts are already pleaded. We have, from the record of appeal, noted that no such allegation of threats or an attempt to dispose of shares have been made by the Appellants to necessitate the granting of an interlocutory

injunction. We are therefore, of the view that there is insufficient risk of dissipation.

8.7 As earlier alluded to, the subject matter in issue are the shares. The number of the shares is known and the value is ascertainable and so are the dividends, profits and losses which may arise in the company. In the event that the Respondent does any act, between now and the determination of the matter in the court below, which would interfere with the interest of the beneficiaries in relation to the shares ,the Respondent is accountable under the provisions of **The Intestate Succession Act** and also the beneficiaries would adequately be compensated by damages

8.8 At the hearing, Counsel for the Appellants cited the **Finsbury Investment** case, whose cause number was provided as SCZ appeal number 128 of 2016; where it was alleged that the Supreme Court held that, shares are an essential property and if no injunction is granted to maintain the *status quo*, the plaintiff would suffer irreparable injury. Our search for this case high and low

has unfortunately not yielded any results to justify our dependence on the same.

## 9.0 CONCLUSION

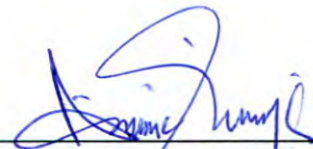
9.1 We find no basis in which to fault the learned Judge in the court below. The appeal has no merit and is accordingly dismissed with costs to the Respondent to be paid forthwith. Same to be taxed in default of agreement. The matter is remitted back to the same Judge for determination of the main cause.



**J. CHASHI**  
**COURT OF APPEAL JUDGE**



**M.J SIAVWAPA**  
**JUDGE PRESIDENT**



**D.L.Y SICHINGA, SC**  
**COURT OF APPEAL JUDGE**