

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

**SP. 30/2024
CAZ/08/337/2023**

BETWEEN:

**CHUBB EUROPEAN GROUP SE
CORPORATE SPECIAL RISKS SAS
SOMPO JAPAN NIPPONKOA MART
& BOULART SAS
CARL SCHOTER
AIG EUROPE SA
LIBERTY SPECIAL MARKETS
BALOISE BELGIUM NV**

**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT

4TH APPELLANT
5TH APPELLANT
6TH APPELLANT
7TH APPELLANT**

AND

**ZOPCO SA
ALEX STEWART INTERNATIONAL
ZAMBIAN LTD
ALEX STEWART INTERNATIONAL UK**

**1ST RESPONDENT
2ND RESPONDENT

3RD RESPONDENT**



***Coram: Makungu, Chishimba and Chembe, JJA
On 23rd October 2024 and 28th January, 2025***

*For the 1st Respondent/Applicant: Mr. T. Chibeleka & Mr. N. Chaleka
both of ECB Legal Practitioners.*

✓ *For all the Appellants/ Respondents: Miss L. M. Nkonde of Mweshi
Banda &
Associates*

RULING

MAKUNGU JA delivered the ruling of the Court.

Cases referred to:

1. *Bidvest Food Zambia Limited & Others v. CAA Import and Export Limited,
SCZ Appeal No. 56 of 2017*

2. *Chansa Chipili and Powerflex (Z) Limited v. Wellington Kashimike & Wilson Kalumba* (2012) ZR 483
3. *Kalunga Chansa v. Evelyn Hone College*, Appeal No. 134/2019
4. *Telemichael Men Gstab & Semhar Transport & Mechanical Limited v. Ubuchinga Investments Limited*, SCZ Appeal No.218 of 2013
5. *Winnie Zaloumis v. Felix Mutati & Others*, Selected Judgment No. 28 of 2016
6. *Kitwe City Council v. William Nguni* (2005) Z.R 57 (S.C)
7. *Y.B and Transport Limited v. Supersonic Motors Limited*, SCZ Judgment No. 3 of 2000
8. *Zambia Revenue Authority v. Post Newspaper Limited*, SCZ Judgment No. 18 of 2016
9. *Barclays Bank Zambia v. Nyangu & Others*, SCZ/8/080/2012
10. *Savenda Management Services Limited v. Stanbic Bank Zambia Limited*, SCZ, Selected Judgment No. 10 of 2018

Legislation referred to:

1. *The Court of Appeal Rules*, Statutory Instrument No. 65 of 2016
2. *The Court of Appeal Act*, No. 7 of 2016
3. *The High Court Act*, Chapter 27 of the Laws of Zambia
4. *The Rules of the Supreme Court of England*, 1965 (the White Book)

1.0 INTRODUCTION

- 1.1 This ruling is twofold: Firstly, it addresses an application for leave to appeal to the Supreme Court against the judgment rendered by this Court on 3rd May 2024, and secondly an application for a stay of execution of the same judgment pending the determination of the proposed appeal.
- 1.2 The application for leave to appeal is premised on the following grounds:

- a) *That the proposed appeal raises points of law of public importance;*
- b) *That the proposed appeal demonstrates reasonable prospects of success; and*
- c) *That there are compelling reasons for the appeal to be heard.*

1.3 We note that the parties continued to refer to themselves by their designations in the main appeal. However, in this application, the 1st respondent is the applicant, and the seven appellants are the respondents. Thus we shall henceforth refer to them as such. We remind counsel of the importance of correctly citing the parties in applications of this nature to avoid confusion and ensure clarity. It seems to us that the “2nd and 3rd applicants” were misjoined to the motion as they have not filed any documents regarding the same and were not represented at the hearing.

2.0 AFFIDAVIT IN SUPPORT OF MOTION LEAVE TO APPEAL TO THE SUPREME COURT

2.1 In the affidavit dated 17th May 2024, sworn by Nathan Chaleka, counsel for the applicant, the deponent averred that the respondent raised preliminary issues in the lower Court,

which were dismissed. Dissatisfied with the outcome, the respondents escalated the matter to this Court, which delivered a judgment on 3rd May 2024, that partially upheld the appeal and dismissed the remainder of the action as it pertained to the respondents.

2.2 Following this judgment, the applicant's key officers instructed counsel to seek leave to appeal to the Supreme Court. He further deposed that this Court did not adequately consider a Supreme Court decision central to the preliminary issues and, in so doing, either departed from or restated that precedent. According to the deponent this omission raises significant questions concerning judicial consistency and adherence to the principle of stare decisis.

2.3 The deponent further deposed that the proposed appeal has high prospects of success as it raises matters of public policy. He stated that if lower courts interpret this Court's decision as deviating from Supreme Court precedent, it may undermine judicial stability and lead to inconsistent rulings.

2.4 Additionally, the deponent averred that the appeal will not cause prejudice to the respondents, as they have already had their opportunity to be heard. Instead, granting leave to appeal

will serve interest of justice by ensuring clarity and consistency in the application of legal principles.

3.0 AFFIDAVIT IN OPPOSITION

3.1 The affidavit in opposition was sworn by Musenge Leah Nkonde, Counsel for the respondents. She averred that this Court in its judgment dated 3rd May 2024, provided a detailed explanation for not upholding two of the grounds of appeal advanced by the respondents.

3.2 Miss Nkonde further averred that the judgment comprehensively analyzed all relevant authorities pertaining to the appeal while adhering to established Supreme Court precedent. She deposed that the proposed grounds of appeal set out in the notice and memorandum of appeal were devoid of merit and failed to disclose any issues of public policy warranting consideration by the Supreme Court.

3.3 Regarding paragraph 10 of the affidavit in support of the motion, she stated that the same contained statements that amounted to legal opinions and conclusions, which she argued should be expunged from the record. She further averred that the applicant's claim that the Court's decision contradicted

established Supreme Court precedent and undermined the judicial system was unsubstantiated.

- 3.4 She further stated that, the appeal did not meet the statutory requirements for leave to appeal to the Supreme Court.

4.0 AFFIDAVIT IN REPLY

- 4.1 The affidavit in reply was sworn by Nathan Chaleka, the same deponent of the affidavit in support of the motion. He averred that paragraph 5 of the opposing affidavit implicitly acknowledged that the appeal partially succeeded.

- 4.2 The deponent went on to state that the judgment did not provide a clear explanation as to why the lower court's judicial discretion was overturned or why the Supreme Court precedent was not followed. He deposed that the influx of foreign entities conducting business in Zambia highlights the importance of judicial protection for local companies when disputes arise within the country. This protection, extends beyond the present parties and forms a matter of significant public importance.

- 4.3 The deponent further averred that the respondents had taken a narrow interpretation of this Court's judgment, overlooking the broader implications for the judicial system's role in

safeguarding domestic businesses. That the failure to distinguish a Supreme Court decision relevant to the dispute could adversely affect numerous foreign businesses operating in Zambia, thereby elevating the matter beyond the specific context of the present case.

- 4.4 Finally, he averred that the motion satisfied the established criteria for leave to appeal and presented compelling reasons for the Supreme Court's intervention.

5.0 SKELETON ARGUMENTS IN SUPPORT OF THE MOTION FOR LEAVE TO APPEAL TO THE SUPREME COURT

- 5.1 In the skeleton arguments supporting the notice of motion filed on 17th May 2024, the applicant's counsel invoked **sections 13(1), (2), and (3) of the Court of Appeal Act**, which empower this Court to grant the application for leave to appeal to the Supreme Court. The proposed appeal raises a point of law of public importance, it is likely to succeed or there are compelling grounds for the Supreme Court to consider the appeal. Counsel referenced the case of **Bidvest Food Zambia Limited & Others v. CAA Import and Export Limited**¹ to define what constitutes a point of law of public importance.

- 5.2 Counsel argued that the proposed appeal raises significant legal questions, particularly concerning the applicant's claim that this Court either contradicted or restated a Supreme Court decision. This contention, according to counsel, elevates the appeal to a matter of public importance due to the need for judicial consistency, especially at the superior court level, where decisions bind lower courts.
- 5.3 That the High Court, after acknowledging that the applicant had the option to litigate rather than arbitrate, exercised its discretion based on allegations of fraud and the availability of evidence in Zambia, consistent with the **Chansa Chipili and Powerflex (Z) Limited v. Wellington Kashimike & Wilson Kalumba**.² However, this Court disregarded the Supreme Court decision in the **Chansa Chipili** case by reversing the lower court's jurisdictional ruling without addressing or explaining the departure from precedent.
- 5.4 He contended that by failing to address the relevance of the **Chansa Chipili** case and not providing a justification for overriding the lower court's discretionary decision, this Court created a precedent that could compel lower courts to rigidly apply jurisdictional clauses, even in cases where evidence and convenience favour local adjudication. This approach,

according to counsel, undermines the doctrine of stare decisis and judicial discretion.

- 5.5 The Court's failure to clarify the rationale for overturning the lower court's exercise of discretion, effectively sending the parties to Belgium despite the respondents' admission of jurisdictional challenges in obtaining evidence there, raises the issue to the threshold of public importance.
- 5.6 Judicial discretion, counsel noted, is rarely overturned without compelling reasons. Citing **Kalunga Chansa v. Evelyn Hone College**,³ counsel stressed that judicial discretion should only be disturbed when it is exercised arbitrarily or unreasonably, contrary to precedent and legal standards. In the present case, the Court failed to justify why it upset the lower court's discretion, instead engaging in an interpretation of the policy terms at a preliminary stage without inviting submissions from the applicant.
- 5.7 He stated that the Court improperly volunteered a ruling on a substantive issue without affording the applicant a chance to be heard, contrary to the guidance in **Telemichael Mengstab & Semhar Transport & Mechanical Limited v. Ubuchinga Investment Limited**.⁴ If the Court considered the issue of forum non conveniens pertinent, it should have either sought

submissions from the applicant or remitted the matter to the trial court for determination.

5.8 Lastly, that awarding costs to the respondents despite their partial success on appeal was erroneous. The applicant was left unclear about the reasoning behind the costs award, given the partial nature of the respondents' success.

5.9 Based on the preceding, counsel maintained that the proposed appeal has high prospects of success and raises legal questions warranting appellate review by the Supreme Court.

6.0 SKELETON ARGUMENTS IN OPPOSITION

6.1 In opposing the motion, counsel for the respondents Miss Nkonde relied on skeleton arguments dated 13th August 2024. Counsel argued that paragraph 10 of the applicant's affidavit in support of the motion contained legal arguments contrary to **Order 5, Rule 6 of the High Court Rules**, which stipulates the permissible contents of an affidavit. Therefore, it was submitted that this paragraph should be expunged.

6.2 Regarding the substance of the application, counsel contended that the motion did not meet the threshold outlined in **Section 13(3)(a) of the Court of Appeal Act**. Citing **Bidvest Food Zambia Limited and 4 Others v. CAA Import and Export**

Limited,¹ counsel emphasized that for a matter to qualify as a point of law of public importance, it must involve extraordinary questions, new legal interpretations affecting public authorities, protection of fundamental rights, environmental issues, or democratic governance. A point of law must (i) be purely legal, (ii) concern public importance, and (iii) be raised in the appeal. It should not be entangled with factual disputes. The applicant has misconstrued this Court's decision by claiming that the Court disregarded the **Chansa Chipili**² case in determining whether the lower court had discretion to hear the matter.

- 6.3 To clarify this point, counsel reproduced relevant portions of the judgment in question and argued that the intended appeal raises no point of law but rather factual issues regarding the interpretation of the Marine Policy. Counsel noted that the lower court referred to the **Chansa Chipili**² case due to its belief that issues of fraud, supported by evidence located in Zambia, warranted adjudication in this jurisdiction. However, the central issue was whether the correct forum for the dispute was arbitration or litigation, and if litigation, whether it should proceed in Zambian courts or Belgian courts. This Court, after reviewing the entire Marine Policy, correctly determined that

the Belgian courts held jurisdiction, rendering the **Chansa Chipili**² case inapplicable.

- 6.4 She refuted the applicant's claim that this Court denied it the opportunity to make submissions on the Marine Policy's interpretation. He pointed out that Pages J29 to J31 of the Court of Appeal judgment, along with the applicant's affidavit and skeleton arguments in opposition filed on 4th September 2023, show that the applicant extensively discussed its interpretation of the Marine Policy, asserting that amendments had brought the matter under Zambian jurisdiction. Thus, the contention that the Court interpreted the Marine Policy without hearing the applicant is incorrect and does not justify escalating the case to the Supreme Court.
- 6.5 She further argued that the lower court's exercise of discretion was not judicious, as the judge failed to review the Marine Policy in full, which would have negated the need for discretion. The necessity for thorough review of the record during interlocutory applications was underscored in **Winnie Zaloumis v. Felix Mutati and Others**.⁵ The Court's decision to set aside the lower court's ruling was based on this principle.

6.6 Regarding the applicant's claim that this Court erred by holding that the lower court overlooked the respondents' written submissions, Miss Nkonde refuted any deviation from **Kitwe City Council v. William Nguni**,⁶ stating that the Court did not imply that submissions are binding but noted a manifest error in the lower court's factual assessment, which became evident upon reviewing the respondents' submissions and affidavit evidence. He emphasised that this Court's decision was not solely based on written submissions but on a detailed review of the evidence. Therefore, this argument also fails to meet the threshold for a Supreme Court appeal.

6.7 Regarding the award of costs to the respondents, Miss Nkonde submitted that costs are awarded in the discretion of the Court. She relied on the case of **Y.B and F Transport Limited v. Supersonic Motors Limited**,⁷ that costs follow the event, a successful party should normally not be deprived of his costs. She submitted that the preliminary issue was raised to dismiss the action entirely. The only portion this Court did not grant was to refer the matter to arbitration because it had found that the applicant had improperly commenced this matter in the Zambian Courts. Consequently, the respondent's request for stay of the improperly commenced proceedings

could not be sustained. The applicant's intended appeal against the order for costs is untenable. Accordingly, counsel urged us to dismiss the application for leave to appeal.

7.0 REPLY

7.1 The arguments in reply were mainly a repetition of the main arguments and we shall not recapitulate them.

8.0 AFFIDAVIT IN SUPPORT OF AN ORDER FOR STAY OF EXECUTION OF THE JUDGMENT OF THIS COURT RENDERED ON 3RD DAY OF MAY 2024

8.1 The affidavit in support of the application for a stay was sworn by Nathan Chaleka, counsel for the applicant. He stated that following this Court's decision to overturn the lower court's ruling, the applicant filed an application for leave to appeal to the Supreme Court.

8.2 He further deposed that the respondents' advocates had issued a letter demanding payment of costs within 14 days from 17th May 2024, failing which they would proceed to taxation.

8.3 That if the respondents initiate taxation proceedings, the applicant's proposed appeal on the issue of costs will be rendered academic.

8.4 That the application for leave to appeal out of time has strong prospects of success, particularly regarding the costs order. He also maintained that granting a stay of execution would not prejudice the respondents, as they would still have the opportunity to be heard on the merits of the applicant's application.

9.0 SKELETON ARGUMENTS IN SUPPORT OF AN ORDER FOR A STAY OF EXECUTION

9.1 In the skeleton arguments dated 27th May 2024, Mr. Chaleka relied on **Order 10 Rule 5 of the Court of Appeal Rules** and **Order 59 Rule 13 of the Rules of the Supreme Court of England** as authority that an appeal does not automatically stay the execution of a lower court's decision.

9.2 He outlined the considerations for granting a stay of execution, which include:

(a) *The presence of sufficient and valid reasons for the stay;*

(b) *The real prospects of success for the appeal (or in this case, the applicant's application to stay execution pending the determination of their request for leave to appeal to the Supreme Court); and*

(c) *Whether the appeal would be rendered nugatory if the stay is not granted.*

- 9.3 He referenced **Zambia Revenue Authority v. Post Newspaper Limited**,⁸ which emphasized that a stay of execution is a discretionary remedy that must be granted judiciously and based on established principles. The successful party should not be denied the benefits of a judgment unless there are good and sufficient grounds. Courts may assess the likelihood of success of the proposed appeal when considering a stay.
- 9.4 Further reliance was placed on **Barclays Bank Zambia v. Nyangu & Others**,⁹ where the Supreme Court stated that a stay may be granted if the appeal would otherwise become futile, particularly if it involves damages that may be difficult to recover if execution proceeds.
- 9.5 He argued that the applicant's application presented valid reasons for a stay. Firstly, the appeal challenges the costs awarded to the respondents and yet the appeal only partially succeeded. Secondly, if the stay is not granted, and the respondents proceed with taxation, the appeal could become academic, as execution appears imminent.
- 9.6 He reiterated that the appeal has strong prospects of success but we shall not rehash the detailed arguments, as they were substantially the same as those made in the application for leave to appeal.

10.0 ANALYSIS AND DETERMINATION

10.1 We have carefully considered the motion for leave to appeal to the Supreme Court, the application for a stay of execution of our judgment dated 3rd May 2024, the affidavits, and the skeleton arguments submitted by both parties.

10.2 We will begin by addressing the issue raised by counsel for the respondent regarding specific portions of the affidavit in support of the motion for leave to appeal, particularly paragraph 10 which is said to contain legal arguments. Paragraph 10 reads as follows:

“That I verily further believe that if left as it is, the decision of this Honourable Court has a binding effect on the lower courts which may then apply this decision against set Supreme Court decisions and upsetting the bedrock of our judicial system.”

10.3 We are of the view that the preceding quotation does indeed consist of legal argument. Consequently, it is expunged from the affidavit as it is inadmissible in this context.

10.4 Turning to the application for leave to appeal to the Supreme Court, this Court will only grant leave to appeal if the application satisfies any of the criteria set out in **Section 13(3)(a), (c), and (d) of the Court of Appeal Act** which require

that the appeal raises a point of law of public importance, has reasonable prospects of success, or presents a compelling reason for the appeal to be heard. The Supreme Court in **Bidvest Food Zambia Limited and 4 Others v. CAA Import and Export**¹ emphasized that the purpose of this provision is to filter out cases that do not warrant the Court's attention. Similarly, in **Savenda Management Services Limited v. Stanbic Bank Zambia Limited**,¹⁰ the Supreme Court highlighted the importance of preventing the admission of frivolous appeals that would delay the enforcement of judgments and strain judicial resources.

10.5 The applicant contends that this Court's decision contradicted or restated the Supreme Court's judgment concerning judicial discretion in jurisdictional matters in **Chansa Chipili**² case. In contrast, the respondents argued that the case was resolved on the basis of interpretation of the jurisdictional clauses in the Marine Policy making the **Chansa Chipili**² case inapplicable.

10.6 A point of law of public importance, as defined in the **Bidvest**,¹ must extend beyond the interests of the immediate parties and address a legal issue of widespread public concern. The Bidvest case also clarified that a point interwoven with factual

matters does not meet this threshold. In the present case, the applicant's grievance stems from this Court's interpretation of factual and contractual provisions rather than a fundamental legal error. The absence of a specific reference to the **Chansa Chipili**² case does not imply a departure from precedent, as the Court's reasoning was rooted in the interpretation of the Marine Policy, which is a question of mixed law and fact.

10.7 The six grounds of appeal appearing in the draft Memorandum of appeal are as follows:

- 1. The Court, in dealing with ground 2 and 3 erred in law and fact when it held that the High Court glossed over the 1st to 7th respondents' written submissions. The position taken by this honourable Court flies in the teeth of Kitwe City Council v. William Ng'uni (2005) Z.R.57 (SC) where the Supreme Court held that the Court is not bound to consider counsel's submissions.*
- 2. Further, the Court in dealing with ground 2 and 3 erred in law and fact when, in proceeding to tackle the first preliminary issue raised in the High Court, the Court dealt with the question of choice of forum which was not raised as a specific question in the*

preliminary questions. The first preliminary question of the 1st to 7th respondents in the High Court was specific to the existence of an arbitration agreement to be determined by a Tribunal in Belguim.

3. The court below erred in law and fact when it accepted the fact that the appellant has a choice in an appropriate case to commence ordinary judicial proceedings instead of arbitration proceedings but went on to hold that the institution of the case in Zambia was in breach of Articles 23 and 24 of the Marine Policy. The holding of the court is in defiance of several Supreme Court decisions to the effect that where there is clear evidence of the material evidence that will resolve the dispute resting in this jurisdiction, the courts can and should assume jurisdiction irrespective of the any foreign jurisdiction clause.

4. The court below erred in law and fact when it ignored the Supreme Court decision of Chansa Chipili and Powerflex (Z) Limited v. Wellington Kashimike & Wilson Kalumba (2012) ZR 483 on its

decision thereby either going against the said decision or at the very least restating it against the principles of stare decisis and public policy.

5. The court below erred in law and fact when it failed to state the measure used to upset judicial discretion exercised by the lower court in assuming jurisdiction in a clear case of material evidence resting in this jurisdiction and in essence sent the parties to Belgium where the 1st to 7th respondents themselves have expressly admitted failure to obtain evidence due to jurisdictional challenges.

6. The court below erred in law and fact when it awarded costs to the 1st to 7th respondents when their appeal only partially succeeded.

7. Any other ground that the 1st respondent may come up with at the hearing.

10.8 We have examined the proposed grounds of appeal and we find no point of law of public importance arising from the intended appeal.

10.9 The applicant further contends that the proposed appeal has reasonable prospects of success, citing perceived errors in the Court's reasoning. The contention that the Court reversed the

lower court's exercise of judicial discretion without justification is unfounded, as the judgment clearly states the reasons why the Marine Policy was interpreted in the manner that it was, and the reasons for overturning the lower Court's decision. This aligns with **Kalunga Chansa v. Evelyn Hone College**,³ where it was held that judicial discretion must be exercised within the bounds of the law.

10.10 The applicant's claim that they were not allowed to make submissions on the Marine Policy is baseless since the record shows that the applicant was afforded ample opportunity to present arguments on this issue and it did.

Overall, the applicant has not demonstrated that the intended appeal has reasonable prospect of success.

10.11 On the question of whether there are other compelling reasons for leave to appeal to be granted, the applicant raised concerns about judicial discretion, and the protection of Zambians doing business with foreign commercial entities in this Country. However, these concerns do not constitute compelling reasons for the matter to be considered by the Supreme Court, for the reason that the Court's findings were predicated on established principles of contract interpretation and judicial discretion.

10.12 Further, the applicant's contention that costs were improperly awarded is without legal basis. The principle established in **Y.B. and F Transport Limited v. Supersonic Motors Limited**⁷ dictates that costs follow the event. Since the respondents partially succeeded, the costs order was justified.


10.13 Regarding the application for a stay of execution pending appeal, this is a discretionary remedy granted when there are sufficient reasons, real prospects of success on appeal, a risk of irreparable damage if the stay is not granted, and a risk that the appeal may be rendered nugatory. (See the case of **Zambia Revenue Authority v. Post Newspaper Limited**⁸). The applicant raised concerns about potential financial prejudice due to the respondents' intention to proceed to taxation.

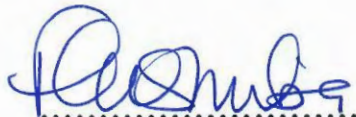
10.14 Nevertheless, considering the lack of prospect of success for the proposed appeal, the respondents should not be deprived of the benefits of their judgment in the absence of compelling reasons.

11.0 CONCLUSION

11.1 In conclusion, the application for leave to appeal is dismissed as it does not meet the requirements of **Section 13(3) (a), (c) and (d) of the Court of Appeal Act.**

11.2 The application for a stay of execution, being dependent on the success of the application for leave to appeal is also dismissed. The respondents are awarded costs to be taxed in default of agreement.


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C.K. MAKUNGU
COURT OF APPEAL JUDGE


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F.M. CHISHIMBA
COURT OF APPEAL JUDGE


.....
Y. CHEMBE
COURT OF APPEAL JUDGE