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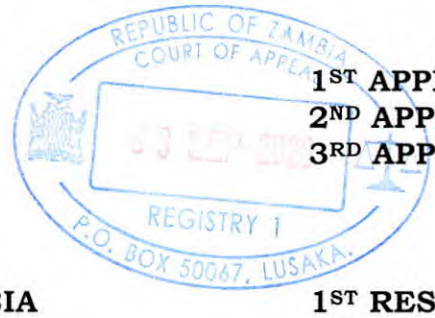
IN THE COURT OF APPEAL OF ZAMBIA **APPEALS NO. 59/2020 AND 94/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN



JOHN MUKOMA KASANGA	**1ST APPELLANT**
FAITH CHAMA KASANGA	**2ND APPELLANT**
LUNZUA BEVERAGE LIMITED	**3RD APPELLANT**

AND

DEVELOPMENT BANK OF ZAMBIA	**1ST RESPONDENT**
SIAKAMWI CHIKUBA *(Sued in his Capacity as Receiver of Independent Management Consulting Services Limited)*	**2ND RESPONDENT**
KAMRAN ASLAM MOHAMMED	**3RD RESPONDENT**
ANNELA ASLAM MOHAMMED	**4TH RESPONDENT**

CORAM: MCHENGA, DJP, MAJULA AND SIAVWAPA, JJA

On 23rd June and 3rd September 2020

FOR THE APPELLANTS:	MR. H. A. CHIZU OF CHANDA CHIZU AND ASSOCIATES
FOR THE 1ST RESPONDENT:	MR. B. GONDWE OF MESSRS BUTA GONDWE AND ASSOCIATES
FOR THE 2ND RESPONDENT:	MR. N. M. MBUYI OF MESSRS PAUL NORA ADVOCATES
FOR THE 3RD AND 4TH RESPONDENTS:	MR. E. KALUBA OF MESSRS ISAAC AND PARTNERS

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Salomon v Salomon and Co. Ltd. (1987) A. C 22.*
2. *Foss v Harbottle (1843) 67 ER 189.*
3. *Zambia Seed Company Limited v Chartered International (PVT) Limited SCZ Judgement No. 20 of 1999.*
4. *National Movement against Corruption v Sofrum Safaris and Others SCZ Appeal No. 16 of 2007.*

Statutes:

1. Companies Act No. 10 of 2017

1. **INTRODUCTION**

The appeal that was initially before us is Appeal No. 94/2019 which was filed on 3rd June 2019. On 9th June, 2020, the Appellants' counsel filed a summons for an order for consolidation pursuant to Order XIII Rule 11 (1) and (2) of the Court of Appeal Rules.

The affidavit in support of the summons deposed to by one John Mukoma Kasanga, who is the 1st Appellant, sought the consolidation of Appeal No. 59/2020 with the instant Appeal No. 94/2019.

According to the deponent of the affidavit, the two appeals involve the same parties and raise similar facts based on the same subject matter being Plot No. 560, No. 55 Independence Avenue, Lusaka. On 10th June 2020, counsel for the 3rd Respondent issued a Notice to raise preliminary issue

pursuant to Order 2 Rule 2, 14A as read together with Order 33 Rule 3 of the Rules of the Supreme Court 1999 Edition.

The issues sought to be determined by the Court are whether it was competent for the Court to hear Appeal No. 59/2020 when there was already an appeal pending raising the same issues as those in Appeal No. 94/2019. Whether the Court had Jurisdiction to hear an appeal arising from a consent Judgment. Whether the Court can hear an appeal raising issues not raised in the Court below.

The 1st Appellant filed an affidavit in opposition to the Notice to raise preliminary issue on 19th June 2020. He deposed that the issues sought to be determined are the subject of the appeal. He further averred that the two appeals were legitimately before Court and application for consolidation had since been filed.

In opposition to the summons for consolidation counsel for the 2nd Respondent, filed an affidavit dated 22nd June 2020. In her affidavit, Mrs. Mbuyi avers that in view of the Notice to raise preliminary issue filed on 10th June, 2020, and the fact that the two appeals emanate from two different Judges, the application for consolidation was not possible and an abuse of Court.

The deponent urged the Court to consider the preliminary issues and dismiss the application for consolidation and instead dismiss the appeal which was filed second in time namely appeal No. 59/2020.

At the hearing of the application for consolidation, we heard arguments from both sides which were not different from the affidavit evidence. What we noted however, is that the parties were in agreement on the issues being raised in the two appeals being the same although the appeals arise from rulings of two different Courts. We then rendered an extempore ruling whose detail will be given in this Judgement.

2. **RULING ON CONSOLIDATION**

We allowed the application for consolidation for the reasons we render now.

The starting point is that Order XIII Rule 11(2) of the Court of Appeal Rules empowers the Court to order consolidation of two or more appeals where sufficient reason to do so exists. We considered the two appeals and the arguments rendered by the parties to determine whether sufficient reason existed to justify a consolidation of the two appeals.

Our perusal of the two Records of Appeal revealed that in both cases, the key issue is whether the Appellants had sufficient

interest to be joined to the proceedings in their individual capacities.

The dispute in both cases was the appointment of a receiver of Independent Management Consulting Services Limited (in receivership) and the subsequent sale of Stand No. 560 Lusaka by the 2nd Respondent in Appeal No. 94/2019 as receiver of Independent Management Consulting Service Limited.

In both cases the Appellants' applications to challenge the receiver were shot down by preliminary issues raised. We therefore, perceived that the two appeals could be dealt with together and we so shall do in this Judgment.

3. THE GENESIS OF THE APPEALS

Both appeals originate from two loan facilities that Independent Management Consulting Services Limited procured from Development Bank of Zambia in August 2013.

The facilities were classified as long term and working capital in the sums of K4, 500,000.00 and K500, 000 respectively. The long term facility had a tenure period of twenty-six quarterly instalments while the working capital had a tenure period of five quarterly instalments.

The facilities were secured by an equitable mortgage over Plot No. 560 Independence Avenue Lusaka, registered in the name of the borrower. The facilities were further secured by fixed and floating debentures over the borrower's assets as well as several and joint guarantees of the shareholders.

In August 2013, the borrower and the 1st Appellant executed a third party mortgage over sub-division A of Lot No. 2320/M Lusaka as additional security for the loan facility to the fixed and floating debentures and the shareholders' guarantees.

Further to the above the borrower and the 1st Appellant executed a Subordination Agreement by which they undertook not to demand or accept any payment from their other creditors without written consent of the 1st Respondent while the loan facility was still running.

In November, 2016, following a variation to the facility of 13th August, 2013, by letter dated 9th September, 2015; as agreed by the parties, a debenture incorporating fixed and floating charges over the assets, of the 3rd Appellant, present and future, was created.

Further to that in November, 2016, the borrower assigned its rights under a lease with the Multi Facility Economic Zone. These rights were pursuant to a Lease Agreement between the

3rd Appellant and the Lusaka South Multi-Facility Economic Zone dated 14th July, 2015.

By letter dated 21st March, 2017, the Borrower submitted the Certificate of Title to Plot 560, Independence Avenue, on which the Borrower sits. The submission of the Certificate of Title was to facilitate a substitution thereof for the cash held by the 1st Respondent as security.

The Borrower also indicated that it had applied for a deferment of the repayment of the facility subsequent to the submission of the Certificate of Title. An equitable Mortgage dated 30th March, 2017, was created over Stand No. 560, Lusaka Province to secure the loan facility.

On 17th September 2018, the 1st Respondent executed a Deed appointing the 2nd Respondent as Receiver and Manager of the Borrower upon default pursuant to Clause 7.01.1 of the Mortgage Deed.

The Receiver Manager notified the Borrower accordingly upon which the 1st Appellant raised certain issues to the Receiver Manager resulting in exchange of correspondence between the parties. With no settlement of the issues, the 2nd Respondent seized the Mortgaged property with a view to realizing it and paying the balance due on the debt to the 1st Respondent.

On 20th September 2018, the 2nd Respondent issued Notice to dispose of the Borrower's assets pursuant to Section 334 of the Companies Act.

On 19th October 2018, the sale of the property was advertised in one of the local newspapers by way of an invitation for bids following a valuation Report dated 9th October 2018.

By letter dated 29th November, 2018, the 3rd and 4th Respondents made an offer to the 2nd Respondent to purchase the property at K4, 000,000.00 with an offer to pay a deposit of K400, 000.00 upon signing of the contract.

A contract of sale was accordingly executed and payment of deposit acknowledged on 1st December 2018. The balance was paid by four cash deposits but on the same date; 12th December, 2018.

Upon learning of the sale, the Appellants commenced an action and obtained an ex parte order of interim injunction against the Respondents dated 18th January, 2019 under the hand of the Hon. Mrs. Justice Banda-Bobo of the High Court.

The remedies sought by the Appellants before Justice Banda-Bobo were as follows;

i. A declaratory order that the appointment of a Receiver by the 1st Defendant was prematurely done and or made in bad faith.

ii. A declaration that the Receiver to sell Sub-division A of Stand No. 560 Lusaka was done in bad faith, ultra-vires and contrary to the law.

iii. An order to nullify the sale of Stand 560 Lusaka and cancellation of the Certificate of Title issued in favour of the 3rd and 4th Defendants.

iv. An order for the nullification of the appointment of the Receiver and/or further remove the receiver from the Register for incompetence.

v. Injunction to restrain the Defendants or any of their agents from harassing the Plaintiffs from Sub-Division A of Stand 560.

vi. Costs

vii. Other relief the Court may deem fit.

However, unknown to the Appellants, the 3rd and 4th Respondents had, on 9th January 2019, filed a writ of summons and a statement of claim in the High Court against the Borrower in receivership.

They claimed a refund of the consideration amount they had paid for the purchase of Stand 560 Lusaka or in the

alternative, an order for delivery of vacant possession thereof by the Borrower in receivership. They also sought for a declaration that the Plaintiffs were bonafide purchasers for value, damages and costs.

On the same date a summons for entry of consent Judgment was filed by the Respondents and a consent Judgment was entered into and signed by the Hon. Mrs. Justice Chawatama.

On the basis of the consent Judgment the Respondents herein sought to have the ex-parte interim injunction granted to the Appellants set aside.

In the meantime, the 3rd and 4th Respondents issued a praecipe and a writ of possession on 16th January 2019 to enforce the consent Judgment of 9th January 2019. This was in the matter relating to Appeal 59/2020. The Appellants proceeded to appoint Messrs Chanda Chizu and Associates who immediately filed Notice of appointment and a summons for joinder of the Appellants and to set aside the consent Judgment as well as to consolidate the two causes. The application was made on 26th February 2019 to be heard before the Hon. Mr. Justice M. D. Bowa on 4th April 2019.

However, in the other matter before Mrs. Justice Banda-Bobo, Counsel for the 1st Respondent had, on 19th February 2019,

issued a Notice of Motion to raise preliminary objection against the action by the Appellants for irregularity and abuse of court process.

The objection was that the Applicants, before commencing the action, did not comply with Section 331 of the Companies Act No. 10 of 2017.

In response, counsel for the Appellants, on 22nd February 2019, raised a preliminary issue against the preliminary objection stating that the objection was an abuse of court process as the issues raised went to the main action. Counsel also argued that there was no requirement to obtain leave of the Court.

Mrs. Justice Banda-Bobo heard the preliminary objection on the affidavits filed by the parties and delivered the ruling which is the subject of Appeal No. 94/2019, on 18th March, 2019.

In response to the summons for joinder of interveners before Mr. Justice Bowa the advocates for the Plaintiffs, who are the 1st and 2nd Respondents in Appeal No. 59/2020, filed Notice of Motion to raise a preliminary issue. The two issues raised were that;

(a) The application for stay and setting aside of the consent Judgment was incompetent as a consent Judgment can only be challenged through a fresh action.

(b) The cause sought to be consolidated with the cause before Judge Bowa had been dismissed by Judge Banda-Bobo by the Ruling of 18th March, 2019.

The preliminary issues were opposed by counsel for the Appellants.

Counsel for the 3rd Respondent also raised a preliminary issue as to whether an intervener, can be joined without leave of the Court where the intervention is made on behalf of the company in receivership.

Mr. Justice Bowa heard the preliminary issues on 6th September 2019. He rendered his ruling on 20th November, 2019 which gave rise to Appeal No. 59/2020 now consolidated with Appeal No. 94/2019.

4. **THE RULINGS IN THE HIGH COURT**

The Ruling handed down by Mrs. Justice Banda Bobo on 18th March 2019 addressed the preliminary objection raised seeking the dismissal of the action for irregularity for non-compliance with Section 331 of the Companies Act No. 10 of

2017. The Section, in particular Sub-sections (1) and (2) provides as follows;

(i) ***"Except as provided in this Section, a director or an entitled person shall not bring or intervene in any proceedings in the name of, or on behalf of a company or its subsidiary."***

(ii) ***"Subject to sub-section (4) the court may, on the application of a director or an entitled person, grant leave to –***

(a) bring proceedings in the name and on behalf of the company or any subsidiary; or

(b) intervene in the proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or subsidiary as the case may be".

The arguments before the Court were that the action commenced by the Directors and the interested party sought remedies that would benefit the company in receivership and therefore, leave of the Court ought to have been obtained before commencing the action.

This argument was connected to the argument that the Appellants lacked locus standi on the principle of separate

legal persona enjoyed by a corporate from its members and directors espoused by the *Salomon v Salomon*[1] and *Foss v Harbottle*[2] causes.

It was also argued that failure to comply with Section 331 of the Companies Act robbed the Court of jurisdiction over the matter.

The Appellants, on the other hand, argued through counsel that they did not require leave of the court as they commenced the action in their individual capacities being interested parties. They further argued that Section 331 applied to companies in receivership.

The learned Judge considered the arguments advanced and came to the conclusion that the Appellants sought remedies that would be for the benefit of the company in receivership.

In his ruling of 20th November, 2019, Mr. Justice Bowa considered the preliminary issues raised by the Appellants and the Respondents, both challenging the competence of the application by the Appellants to be joined to the proceedings giving rise to the consent Judgment in order to challenge it.

The objections were based on the law that a consent Judgment can only be challenged via a fresh action and that the

Appellants lacked the locus standi because they did not have sufficient interest in the matter.

The arguments in opposition were that the Appellants had interest as directors, shareholders and guarantors in and of the company in receivership.

They also argued bad faith on the part of the receiver/manager for selling the company's asset without first managing it. We consider that argument to be one that goes to the substantive application for joinder and setting aside of the consent Judgment which were both denied by the Court below.

Counsel for the Appellants also argued that the law relating to a fresh action to challenge a consent Judgment only applied where the aggrieved party was a party to the action giving rise to the consent Judgment.

We further note that as was argued in the matter before Judge Banda-Bobo, it was submitted that the Appellants could not sustain an action on behalf of a company in receivership without the leave of the Court by which reason; the application by the Appellant was not sustainable.

The learned Judge then reviewed the power he had under Order 14 rule 5(1) and other authorities to grant an order for

joinder and came to the conclusion that the overriding factor was that of locus standi. He then came to the conclusion that the Appellants had not established their interest in the matter because the property that had been sold by the receiver/manager was registered in the name of the Company in receivership. The fact that the Appellants had guaranteed the loan procured by the company in receivership did not create any interest as their securities had not been enforced.

We have carefully read the rulings and the endorsement on the writs of summons as well as the statement of claim and we are in full agreement with the learned Judges in the two matters.

In both cases, the statements of claim clearly show that the Appellants' intent is to have the appointment of the 2nd Respondent as receiver and manager of the assets of the Company reversed and the sale nullified and the Certificate of Title issued to the 3rd and 4th Respondents cancelled so that the said Stand No. 560 Lusaka reverts to the Company in liquidation. If the said remedies were to be granted the direct beneficiary would be the company while the Appellants' benefits would be secondary as shareholders.

On that score, the Appellants could only sue on behalf of the company under derivative actions pursuant to Section 331 of the Companies Act No. 10 of 2017.

Derivative actions are an exception to the general rule as stated in *Foss v Harbottle* that the proper Plaintiff in an action for a wrong alleged to have been committed against a company is the company itself. This is in very exceptional circumstances where the wrong doer is also in control of the company and is not willing to sue. This obviously relates to a company that is operating normally with its board and officers in place managing its affairs.

In this case, we are dealing with a company that is in receivership at the instance of a debenture holder, the secured lender with an instrument that attaches to both fixed movable assets under fixed and floating charges.

The day to day operations of the company are under the sole control of the receiver and manager who also assumes the power to sue and to be sued on behalf of the company.

It is alleged by the Appellants that the receiver's decision to sell the company's single most important asset, Stand No. 560 Lusaka, was made in bad faith and contrary to the law.

On the principle in *Foss v Harbottle*, the derivative action principle applies equally to this case in that the receiver and manager, who has control of the company is the alleged wrong doer against the company. It would therefore, be unreasonable to think that the receiver and manager, in the circumstances would take action against himself for the benefit of the company.

We wish to pose at this juncture and state that in our view, this state of affairs should have been provided for under the Corporate Insolvency Act No. 9 of 2017. However, a careful scan of the Act revealed no such provision as would deal with the situation of shareholders who are aggrieved by the conduct of a secured creditor and/or a receiver who conducts himself in an improper manner in the receivership regime. It means that the Companies Act particularly, Section 331 and case law remain the ultimate authority to seek recourse from.

We therefore, find that the learned Judges properly construed Section 331 of the Companies Act No. 10 of 2017 when they held that the Appellants brought the action on behalf of the Company and therefore ought to have sought leave of the Court to bring the said action on behalf of the Company.

A close look at Section 331, Subsection (1) reveals that it is prohibited for a director or an entitled person to bring or intervene in any proceedings in the name or on behalf of a

Company or its subsidiary outside the provisions of the Section.

Subsection (2) then provides the circumstances under which a director or an entitled person may bring or intervene in proceedings and this is by making an application to and obtaining leave of the Court. The Appellants in this case failed to comply with the law under the mistaken belief that they did not require leave of the court.

We also agree with the holding in the Court below because in trying to join the matter after the consent Judgment had been entered, the Appellant's main objective was to have the said consent Judgment set aside. By seeking that remedy, they would be attempting to protect the interests of the company in receivership. In line with the *Foss v Harbottle* case (Supra), the action would require leave of the Court.

This position of the law also speaks to locus standi in that lack of leave of the Court robs the Appellants of standing to be joined to the case.

We also wish to state that it is our considered view that the legal requirement that a person wishing to challenge a consent Judgment should commence a fresh action is not restricted to one who was a party to the action settled by consent Judgment.

What determines whether or not a person is entitled to challenge a Judgment is the effect the said Judgment has on that person. Once that is established, then, in a Judgment ensuing from a trial, a none-party affected by it can apply to be joined post judgment if they were not aware of the proceedings. In this case, the person is not required to commence a fresh action in order to challenge the Judgment

For a consent Judgment however, apart from establishing that the Judgment affects the person and they were not aware of the proceedings, the law categorically requires that the affected person must institute a fresh action to challenge the Judgment.

This position is supported by the case of *Zambia Seed Company Limited v Chartered International (PVT) Limited*[3] and National Movement against Corruption v Sofrum Safaris and Others[4].

The two authorities were relied upon by the Court below to dismiss the application to set aside the consent Judgment.

We however wish to state that once the Court had dismissed the application for joinder for want of locus standi, the application to set aside the consent Judgment fell off because, without locus standi, the Appellant could not be heard on any other application on the matter.

5. **CONCLUSION**

Ultimately, the two consolidated appeals raised one clear issue for our determination. The issue being whether or not the Appellants had the requisite locus standi to sustain the two actions commenced in the court below.

Both matters were determined on preliminary issues raised challenging the standing of the Appellants vis a vis the failure to obtain leave of the court before commencing an action against a company in receivership and the mode of challenging a consent Judgment.

We have found no cause to reverse the findings of the two Judges in the court below as both rulings were based on sound principles of law applicable to the two cases.

We therefore dismiss the consolidated appeal with costs.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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B. M. MAJULA
COURT OF APPEAL JUDGE

.....
M. J. SIAVWAPA
COURT OF APPEAL JUDGE