IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 182/2018**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BAXY PHARMACEUTICALS MANUFACTURING COMPANY LIMITED	**1ST APPELLANT**
MANOJ PATEL	**2ND APPELLANT**

AND

SANMUKH RAMANLAL PATEL	**1ST RESPONDENT**
DAXA SANMUKH PATEL	**2ND RESPONDENT**

CORAM : CHISANGA JP, KONDOLO AND MAJULA, JJA

On 27th March, 2019 and on 30th March, 2021

For the Appellant : *Mr. S. Magubwi of Messrs Tembo Ngulube & Associates*

Mr. P. Sinkala of Ventus Legal Practitioners

For the Respondent : *Mr. N. Mbuzi of Messrs. Paul Nora Advocates*

J U D G M E N T

KONDOLO SC, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **Attorney General v. Aboubacar Tall v. Zambia Airways Corporation Limited (1995) SJ (SC)**

2. Costellow v. Somerset County Council [1993] 1 ALL ER 952
3. Leopold Walford (Zambia) Limited v. Unifreight (1985) ZR 203
4. Ravindranath Morargi Patel v. Rameshbhai Jagabhai Patel SCZ Appeal No. 37 of 2012
5. Zambia Revenue Authority v. Jayesh Shar (2001) ZR 63
6. Henry Kapoko v. The People 2016/CC/23 (unreported).
7. Access Bank (Zambia) Limited v. Group Five/Zcon Business Park Joint Venture SCZ Judgment No. 76 of 2016
8. NFC Mining Plc v. Techpro Zambia Limited (2009) ZR 236
9. Attorney General v. Marcus Achiume (1983) ZR 1
10. Finance Bank Zambia Limited and 4 Others v. Zambezi Portland Cement Limited Appeal No. 144 of 2015
11. Royal British Bank v. Turquand [1843-60] ALL ER
12. Pender v. Lushington (1877) 6 Ch D 70
13. Hickman v. Kent or Romney
14. Marsh Sheepbreeders Association [1915] 1 Ch 881
15. Rural Development Corporate Limited v. Bank of Credit and Commerce Limited (1987) ZR 35
16. Bellamano v. Ligure Lobarada Limited (1976) ZR 267
17. Mcfoy v. United African Company [1961] ALL ER 1169
18. Twampane Mining Co-operative Union Limited v. E.M. Storti Mining Limited SCZ Judgment No. 20 of 2011.
19. The People v. The Patents and Companies Registration Agency and Another 2017/CCZ/R003
20. Assia Pharmaceuticals v. Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000
21. Datong Construction v Fraser Associates (suing as a firm) CAZ Appeal No. 163 of 2019

LEGISLATION AND OTHER WORKS REFERRED TO:

1. **Charlesworth and Cain Company Law 15th Edition 1983**
2. **The Rules of the Supreme Court of England (White Book) 1999**
3. **The High Court Rules, High Court Act, Chapter 27, Laws of Zambia**

This is an appeal against two High Court Rulings delivered by Judge Chitabo, SC. The first Ruling was delivered on 31st July, 2018 in respect of an injunction granted by the Court. The second Ruling delivered on 27th August, 2018, dealt with a preliminary issue raised by the Respondents regarding the defence and counterclaim filed in the matter. The trial Judge struck out both the defence and counterclaim on account of the fact that they were filed by the Appellants' Advocates without the authority of the 1st Appellant company whose authority could only be given by way of a Board resolution.

In the Court below, the 1st and 2nd Appellants were the 1st and 2nd Defendants whilst the 1st and 2nd Respondents were the 1st and 2nd Plaintiffs.

The brief facts that culminated into the two Rulings are that following misunderstandings between the parties, the Respondents

applied for an interim injunction against the Appellants to restrain them as follows;

1. **The 2nd Defendant from acting upon the purported resolutions made on 10th April, 2017 or any other subsequent of them and from running the affairs of the Company until a further order of the Court.**
2. **The 1st Defendant and the 2nd Defendant from excluding the Plaintiffs from the Board meetings of the Defendant Company or in any way preventing the Plaintiff from acting as Director of the Defendant Company or interfering with them acting as such Directors.**
3. **The 1st and 2nd Defendants and each other from causing or permitting to be removed or taking any steps to remove out of jurisdiction of this Court any of their assets, money or goods within the jurisdiction or from disposing of, transferring, charging or diminishing or in any way of the respective assets, money or goods within the jurisdiction and without prejudice to the generality of the foregoing, in particular:**

a. **Any sums now or hereafter to the credit of the Defendants or any of them in an account 00157906450 with Finance Bank;**

b. **Any sums or hereafter standing to the credit of held on behalf of the defendants or any of them by any other Bank account under the 2nd Defendants company.**

According to the supporting Affidavit, the 1st Appellant (the Company) was incorporated on 30th September, 2011 with the Respondents and the 2nd Appellant as shareholders. The Respondents have invested in excess of US$3, 090, 381.00 in the Company whereas the 2nd Appellant has invested a sum of US$1, 351, 493.00. The 2nd Appellant was the Operating Partner and also in charge of accounts, human resource management and marketing of the 1st Appellant.

Over time, the Respondents were unimpressed with the 2nd Appellant's financial management of the Company and with the fact that the Company was manufacturing products for Vyking Pharmaceuticals Limited a company with which the 2nd Appellant

was associated. The Respondents as co-shareholders agreed that a Mr. Kaustabh Dharka be appointed Chief Operating Officer.

It was attested that the shareholders orally agreed that the Respondents should take control of the operations of the 1st Appellant through a Company called Astro Holdings Limited in which the Respondents had an interest. During the course of business, the 1st Appellant could not properly service orders from the Ministry of Health owing to poor account record keeping attributed to the 2nd Appellant. This prompted the Respondents to borrow funds in order to service orders. An accounts firm, PK Chartered Accountants was consequently appointed to keep accounts on behalf of the 1st Appellant.

It was further attested that sometime in March, 2017 the 2nd Appellant accused the Respondents of siphoning goods worth US$1,000,000.00 from the Company and because of that he unilaterally declared that he would take over management of the Company with effect from 14th March, 2017. On 20th March, 2017 the 2nd Appellant issued a notice for an Annual General Meeting

("**AGM**") scheduled for 10th April, 2017 with the agenda to discuss various aspects of the Company's operations.

The 2nd Appellant was informed that the Respondents would be unavailable for the meeting as they were out of the country. He was further advised that the meeting would be invalid because a quorum would not be formed and, in any event, the requisitioning of the meeting had not complied with the Companies Act.

The meeting still went ahead on 18th April, 2017 and special resolutions were passed. It was attested that the resolutions passed in the absence of the Respondents were null and void. The Respondents queried the Patents and Companies Registration Agency ("**PACRA**") regarding the AGM and the Registrar reversed the changes made by the 2nd Appellant and instructed the parties to hold a valid AGM.

That efforts to resolve the disputes between the parties were futile and in the meantime the 2nd Appellant continued to run and manage the Company without accounting to the Respondents who feared that he would dissipate and remove the Company's assets and

money from the jurisdiction. That he had continued manufacturing products for Vyking Pharmaceuticals Limited. That in the circumstances, an injunction was necessary to restrain the 2nd Appellant.

The Court granted an interlocutory order of injunction on 5th December, 2017 and ordered an inter-partes hearing date. However, instead of filing an affidavit in opposition, the 1st and 2nd Appellants on 12th December, 2017, filed an ex-parte summons for an order to discharge the interlocutory injunction on the ground that the interlocutory injunction was irregularly obtained as the court granted it after being misled by the Respondents who had suppressed material facts.

The Respondents reacted by filing an application *in limine videlicet* to dismiss the 1st and 2nd Appellants application to discharge the interlocutory injunction, inter alia because the Respondents advocates had not filed a notice of appointment as advocates and that there was no resolution by the Company authorizing its purported advocates to act on its behalf and the defence and counterclaim filed by the Appellants was therefore filed without authority/instructions

from the Company as Messrs. Tembo Ngulube Associates had no instructions from the Company.

The Appellants argued that the lack of authority to act had been cured by a notice of appointment as Advocates which was subsequently filed by their Advocates.

The trial Court found that the failure by the Appellants' Advocates to obtain instructions to act on behalf of the Company was fatal as all the steps taken without the requisite authority were null and void. The Court consequently expunged the Appellants affidavit in opposition from the record and further found that in the premises, there was no opposition to the Respondents application for an injunction. The Court held that the injunction ought to be granted. on this ground alone

The trial Court however, proceeded to consider the pleadings and formed the view that the dispute between the parties over the shareholding of the Company disclosed serious questions of law to be tried. That if the injunction was not granted the Respondents

would suffer irreparable damage and the Respondents were consequently granted an interim injunction.

On the issue of the Appellants' advocates acting without authority, the trial Court found that the pleadings filed by the Appellants namely, the defence, amended defence and counterclaim having been filed without authority ought to be struck out and he did just that and expunged the offending pleadings from the record.

Being dissatisfied with the decisions of the lower Court the Appellants raised the following grounds of appeal:

1. **The learned Court below erred in fact and law in its Ruling of 31st July, 2018 when it dismissed the Defendant's application to discharge the ex-parte injunction over a curable procedural omission and held that: "In sum, there is no affidavit in opposition to the interlocutory applicant for an injunction. The 1st Defendant's application and affidavit having been severed from the proceedings for want of authority. On this ground alone, the injunction ought to be**

confirmed and made interlocutory pending the hearing of the main action.

2. **The Court below erred in fact and law in its ruling of 31st July, 2018 when at page R10 it held that, "The 1st Defendant having admitted that his advocates had no authority is critically important."**
3. **The Court below erred both in fact and in law when it held at page J13 of the ruling dated 27th August, 2018 that "having traversed, interrogated and evaluated all the issues advanced by the parties, and in conclusion, I have come to the irresistible inference that Messrs Tembo Ngulube and Company commenced acting for the 1st Defendant without authority as the 2nd Defendant had no capacity nor authority to instruct the later"**
4. **The Court below erred both in fact and law when it held in its Ruling dated 27th August, 2018 that the defence and counter-claim and the amended defence and counterclaim were filed without due authority**

and struck them off and expunged them from the record.

The Appellants filed into Court heads of arguments dated 30th November, 2018. Under ground 1, it was argued that **Order 2 Rule 1 of the Rules of the Supreme Court of England 1999** ("**White Book**") dealing with irregularities of process ought to be applied liberally to prevent injustice being caused to a party. That under **Order 2 Rule 1 of the White Book** the Court is granted power to cure irregularities where a party has failed to comply with the rules of Court.

It was argued that the failure by the Appellants to enter appearance or file a notice of appointment of advocates before taking any step is an irregularity which was curable. According to the Appellants, the irregularities did not warrant the Appellants' Affidavit in opposition (sic) being expunged from the record. That the defect was cured when the Appellants filed a notice of appointment as Advocates on 20th December, 2017.

The Appellants were alive to the fact that in Zambia, the White Book is only applicable where there is a lacuna in our laws. The case of **Attorney General v. Aboubacar Tall v. Zambia Airways Corporation Limited** (1) was cited in that regard. The Appellants contended that the role of the Court is to decide on the rights of the parties and not to punish them for honest omissions in the conduct of their cases. That parties ought to be heard on the merits. We were referred to the English case of **Costellow v. Somerset County Council** (2) where the Court held that matters ought to be determined on the merits and the Court must not rigidly apply the rules of Court. We were also referred to the decision of the Supreme Court in the cases of **Leopold Walford (Zambia) Limited v. Unifreight** (3) and **Ravindranath Morargi Patel v. Rameshbhai Jagabhai Patel** (4) where it was opined that breach of regulatory rules is curable and not fatal. Further, that the Court must have regard to the nature of the breach and the stage at which such breach was committed. The case of **Zambia Revenue Authority v. Jayesh Shar** (5) was cited.

We were referred to the provisions of **Article 118 (2) (e) of the Constitution** which provides that courts must not dismiss matters

by giving undue regard to technicalities. The decision of the Constitutional Court in the case of **Henry Kapoko v. The People** (6) was referred to where it interpreted the said provision.

The Appellants maintained that the failure to file a notice of appointment as advocates was a curable defect and allowing them to cure it would not have prejudiced the Respondents. They concurred that rules of Court must be adhered to and we were referred to the cases of **Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture** (7) and **NFC Mining Plc v. Techpro Zambia Limited** (8) where the Court guided that litigants must adhere to procedural imperatives.

The Appellants reiterated that notwithstanding the foregoing, offending the rules of Court must not always lead to matters being dismissed because they should be decided on the merits. It was argued that the lower Court erred when it dismissed the Appellant's affidavit in opposition on account that a notice of appointment as advocates was not filed because failure to do so did not necessarily mean that the Advocates had no authority to act on behalf of the

Appellants. That the finding that the Appellants' Advocates lacked authority is perverse and must be set aside.

Under ground 2 the Appellants submitted that they at no time admitted that their Advocates had no authority to act for the 1st Appellant. That this finding of fact was not supported by the evidence and must be reversed. To support this argument, we were referred to the case of **Attorney General v. Marcus Achiume** (9) where the Court guided that findings of fact can be reversed if they are perverse or not supported by any evidence.

Under ground 3, the Appellants argued that the old common law position that a board resolution was required to commence proceedings on behalf of a company was abolished by **Sections 23** and **24** of the **Companies Act, 2017**. To further buttress this argument, we were referred to the case of **Finance Bank Zambia Limited and 4 Others v. Zambezi Portland Cement Limited**(10) where the Supreme Court confirmed that **Sections 23 and 24 of the Companies Act (Repealed Companies Act)** no longer required a board resolution to enable a company to commence an action in

court. It was submitted that the provisions of the current Companies Act remain the same.

It was further contended that the firm Messrs Tembo, Ngulube & Associates were duly appointed by the 2nd Appellant who is the majority shareholder in the Company. That the issue of whether or not a resolution was passed by the Company is an internal one which should be of no concern to the Appellant's Advocates. We were referred to the case of **Royal British Bank v. Turquand** (11) with regard indoor management of a company.

It was the Appellants' contention that **Section 25 (1) of the Companies Act** provides that a company shall have articles of association that will regulate the conduct of the company. Further, that the learned authors of **Charlesworth and Cain Company Law 15th Edition 1983** opine that articles of association regulate the internal affairs and management of a Company. Further still, that by **Section 26** of the **Companies Act**, articles of association have the effect of a contract between the company and each member and amongst other members. To illustrate the binding effect of articles of association we were referred to the cases of **Pender v. Lushington**

(12) and **Hickman v. Kent or Romney Marsh Sheepbreeders Association** (14)

It was pointed out that the Company's articles of association do not require a board resolution to commence a court action. That the lower Court therefore erred when it expunged the Appellant's amended defence and counter-claim from the record. The Appellants urged the Court to allow the appeal with costs and that both rulings be set aside and the amended defence and counter claim be allowed to stand to enable the matter to be determined on the merits.

The Respondent, reacting to ground 1, supported the trial judges holding that the failure to enter appearance and the Appellants advocates failure to file a notice of appointment as advocates was fatal. That under **Order 11 of the High Court Rules** it is mandatory for a party to enter appearance. We were referred to the case of **Rural Development Corporate Limited v. Bank of Credit and Commerce Limited** (15) where the Court held that a defendant ought to enter appearance before they can be heard.

It was argued that the ex-parte summons filed by the Appellants on 12th December, 2017 did not comply with the rules. We were referred to the case of **Bellamano v. Ligure Lobarada Limited** (16) where the Court held that irregular documents must not be entertained by the Courts.

The Respondents contended that the Appellants only sought to cure the defect after the Respondents had raised a preliminary issue on a point of law. We were referred to the case of **Mcfoy v. United African Company** (17) where the Court stated that one cannot put something on nothing and expect it to stand. The Respondent maintained that the failure by the Appellants to demonstrate authority to act at the time the application was made could not be cured. That the Appellants flouted the rules of Court at their own peril. To buttress this point, we were referred to the case of **Twampane Mining Co-operative Union Limited v. E.M. Storti Mining Limited** (18). Further, that in line with the decision of the Supreme Court in **Zambia Revenue Authority v, Jayesh Shah** invalid court process cannot be cured.

With regard the argument that **Article 118** of the **Constitution** provides that matters should not be defeated on account of procedural technicalities, the Respondent argued that the said article did not oust the parties' obligations to comply with procedural imperatives. We were referred to the case of **The People v. The Patents and Companies Registration Agency and Another**. (19)

Under ground 2, the Respondent argued that the record at pages 273 -281 clearly shows that the Appellants had no authority when the matter came up for hearing.

Under ground 3 and 4, the Respondent agreed that **section 24** of the **Companies Act, 2017** has removed the presumption of constructive notice when dealing with third parties. It was however submitted that, in the circumstances of this case neither **Sections 23 nor 24** of the **Companies Act, 2017** are applicable because the firm Messrs Tembo Ngulube had knowledge that the 2nd Appellant had no authority to act by the Order of interim injunction dated 12th December, 2017.

Further, that the Respondents Advocates wrote a letter to the Appellants Advocates of record advising that they had no authority to act for the Company. That in these circumstances a board resolution ought to have been passed appointing Messrs Tembo Ngulube Advocates to Act for the Company. We were referred to the case of **Finance Bank Zambia Limited and Others v. Zambezi Portland Cement Limited** (10) where the Court stated that if a defect is incapable of being corrected the Court must dismiss the action. Further, that in the case of **Assia Pharmaceuticals v. Nairobi Veterinary Centre Ltd** (20) the Kenyan Court held that a resolution of the Company was required in order for a suit to be properly instituted on behalf of the Company.

It was contended that even when the Appellants' advocates became aware of the defect there had been no ratification. The Court was urged to dismiss the appeal with costs.

We have carefully considered the Rulings of the lower Court, the grounds of appeal and the arguments by the Parties. We hold the view that the grounds of appeal raise two cardinal issues, namely;

1. **whether the appellant's advocates required authority by way of resolution to act for and on behalf of the appellant.**
2. **Whether the injunction was properly granted.**

We shall begin with the first question. The case of **Finance Bank Zambia Limited and 4 Others v. Zambezi Portland Cement Limited** (10) cited by the Appellants is instructive with regard to whether or not a company requires a board resolution before commencing a court action. The Supreme Court when considering the provisions of **Section 23 and 24** of the **repealed Companies Act**, stated as follows:

> **"When these two sections are read together it becomes apparent that the Companies Act has changed the common law position on commencement of actions without authority. It is no longer a valid argument to argue that a writ has been issued without authority because section 23 does not make such an action invalid."**

The provisions of **sections 23** and **24** of the current **Companies Act No.2 of 2017** are similar and read as follows,;

23. (1) A person dealing with the company or any person who has acquired rights from the company, in good faith, shall not be prejudiced by the company or a guarantor of an obligation of the company by reason only that—

(a) the articles have not been complied with;

(b) a person named as director of the company in the most recent notice received by the Registrar is not—

(i) a director or an employee of the company;

(ii) duly appointed; or

(iii) authorised to exercise powers performed by a director or executive officer; or

(c) a director, nominee or chief executive officer of the company acted fraudulently or forged a document, that was signed on behalf of a company.

(2) Subject to subsection (3), a document executed on behalf of a company by a director, nominee or chief executive officer of the company with actual authority to execute the document, shall be valid. Capacity, powers and rights of company Validity of acts Companies [No. 10 of 2017 427

(3) A document specified in subsection (2), shall be void if, at the time the document was executed, a person dealing with the company or acquired rights from the company, knew or ought to have known, by virtue of that person's relationship with the company, of the facts specified in subsection (1).

24. A person shall not be affected by, or presumed to have notice of the contents of the articles or any other document of a company, by reason only that the articles or document is— (a) registered or has been lodged with the Registrar; or (b) available for inspection at the office of the company.

It is trite that third parties are not expected to be aware of the indoor management of a Company. However, this rule has exceptions. In the case of **Datong Construction v Fraser Associates**[21] we noted the following:

"However, it is also important to note that the doctrine of indoor management is subject to certain exceptions; where the third party had actual knowledge of the irregularity or deficiency in authority, or if the circumstances surrounding

the contract or transaction are suspicious, which ought to have put the third party on notice to inquire into the actual authority."

The Respondents did not draw our attention to any pages on the record of appeal showing the letter they claim was written to the Appellants advocates advising that the 2nd Appellant had no authority to act for the Company. We have seen no such communication and for that reason we cannot assume that the Appellants' advocates were put on inquiry in that regard.

We are therefore of the view that the Appellants Advocates properly instituted the proceedings in the High Court against the Respondents. As was held in **Finance Bank Zambia Limited and 4 Others v. Zambezi Portland Cement Limited** the Appellant's advocates were not obliged to query the Company's indoor management. The lower Court therefore fell in error when it expunged the Appellants' pleadings on the ground that there was no company resolution authorizing their Advocates to act on behalf of the 1st Appellant. Similarly, the trial Court fell in error when it expunged the Appellants' affidavit in support of its application to discharge an

order of interlocutory injunction. We consequently order that the expunged pleadings be restored to the record.

We now turn to the issue of the injunction. We must point out from the outset that despite expunging the Appellant's Affidavit the lower Court nonetheless proceeded to consider the pleadings when deciding whether or not to grant an interim injunction. The trial Judge took the view that the matter involved rights over shares and there were serious questions to be tried. Consequently, the trial Judge confirmed the injunction.

We have carefully perused the record and note that the Parties had been fighting concerning the shareholding of the 1st Appellant. The main issue stems from the 2nd Appellant's claim that he became the majority shareholder of the company after the 1st Respondent sold him fifty shares thus pushing his shareholding above 50%. Further, the 2nd Appellant convened a meeting in the absence of the Respondents and it was resolved that he takes over management of the 1st Appellant. This irked the Respondents who followed up the issue with PACRA.

We have perused the communication between the Respondents and PACRA and observe that the Registrar noted the irregular manner in which the 2nd Appellant held a meeting and took over control of the Company. The Registrar advised that a proper company meeting be reconvened. The record does not show that a meeting was convened as directed by the Registrar and the 2nd Appellant continued to run the affairs of the Company following the irregular meeting.

We agree that *prima facie*, there is a serious question to be tried and that the disputes between the parties are best suited for determination at trial. Further, considering the manner in which the 2nd Appellant convened the meeting where he took control of the management of the 1st Appellant, the Respondents' fears that the Appellants may dispose of assets and real property belonging to the Respondents are justified.

Lord Denning in **Fellowes and Son v Fisher** (24) made the following observation regarding the considerations taken into account before a Court may grant an injunction:

"There may be many other special factors to be taken into consideration in the particular circumstances of individual cases... These individual cases are numerous and important. They are all cases where it is urgent and imperative to come to a decision. The affidavits may be conflicting. The questions of law may be difficult, and call for detailed consideration. Nevertheless, the need for immediate decision is such that the Court has to make an estimate of the relative strength of each party's case. If the plaintiff makes out a prima facie case, the Court may grant an injunction. If it is a weak case, or it may be met by a strong defence, the Court may refuse the injunction."

We are therefore of the firm view that the *status quo* be maintained by way of an injunction. Failure to maintain the *status quo,* would, in our view, result in irreparable damage which cannot be atoned for in damages by the 2nd Appellant. We hold the view that the lower Court properly granted the interim injunction to maintain

the status quo pending the determination of the main matter and the injunction is consequently confirmed.

The Appeal having partially succeeded, we order that costs of this appeal will follow the outcome in the lower Court.

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F.M. CHISANGA
JUDGE PRESIDENT

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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE