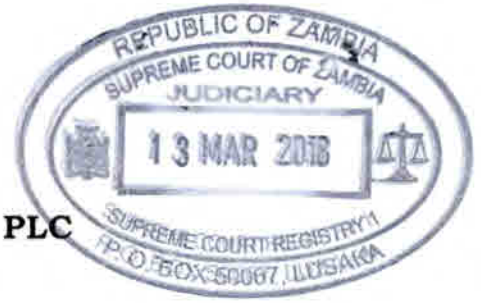
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 36/2011**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

MOPANI COPPER MINES PLC **APPELLANT**

AND

MONLO INVESTMENTS LIMITED **RESPONDENT**

Coram: Mwanamwambwa, DCJ., Wood and Kajimanga JJS.

On 6th March, 2018 and 13th March, 2018.

For the Appellant: *Mr. A. Gondwe – Legal Counsel*

For the Respondent: *No Appearance*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Legislation referred to:

(i) Order 39 of the High Court Rules Cap 27 of the Laws of Zambia.

We apologize for the delay in dealing with this appeal. The notice of appeal was filed on 5th August, 2010. The record shows

that the appeal was heard by judges who have since retired. In the circumstances we had to hear it de novo on 6th March, 2018.

This is an appeal against a decision of the High Court ordering the appellant to pay out money paid into court to the respondent which had been paid into court as a result of garnishee proceedings.

The facts giving rise to this appeal are these. On 11th March, 2006, the respondent issued a writ of summons against a company called Cementation Rockmechanics Civil Exploration and Mining Zambia Limited (hereinafter called "the defendant") for K193,690,876.25 (now K193,690.88) together with interest and costs. On 22nd May, 2006 the plaintiff obtained an attachment order for K245,000,000.00 (K245,000.00) against the appellant for monies due to the defendant from the appellant. Judgment in default of appearance was entered on 9th June 2006. On 15th June, 2006, the respondent obtained a garnishee order nisi and on 28th June, 2006 the garnishee nisi was made absolute. The appellant applied to set aside the garnishee order absolute on 7th July, 2006.

The application to set aside the garnishee absolute was dismissed on 8th August, 2006. The matter did not end there. On 22nd November, 2006 the respondent took out a summons for the interpretation of the ruling of 8th August, 2006 and for the taking of an account of how the garnishee had distributed a sum of USD159,851.75. The application was heard on 1st February, 2007. In a ruling delivered on 19th February, 2007, the learned judge held that she was satisfied with the statement of account given by the garnishee regarding the distribution of the USD159,871.75. On 21st January, 2010 the learned judge granted an ex-parte order for leave to issue a writ of fieri facias against the appellant as garnishee for the sum of K144,230.00. On 27th January, 2010, the appellant took out an ex-parte summons for stay of execution of the writ of fieri facias and to set aside the ex-parte order for leave on the ground that it was irregular. The affidavit in support sworn by Kyansenga Vundamina Chitoshi stated that the appellant had paid the respondent the sum of K100,769.97 in compliance with the ruling of 8th August, 2006. The deponent further stated that the learned judge had earlier held in a ruling dated 19th February, 2007 that she was satisfied with the statement of account given by the

appellant as garnishee regarding the distribution of USD159,871.75 that the appellant owed to the defendant. The deponent went on to state that the learned judge further held that if the respondent wanted the court to consider that the money taken by the appellant from the defendant's dues after the garnishee order absolute had been received should have been credited back to the defendant and eventually paid to it, then the respondent should have applied for review and not for interpretation of the ruling. The deponent added that appellant had paid the respondent and disbursed all amounts due to the respondent and there was nothing else to pay.

In his affidavit in opposition to the ex parte application for a stay, Jeremon Mushanga on behalf of the respondent stated that the rulings dated 8th August, 2006 and 19th February, 2007 were delivered long after the appellant had already disbursed the monies on the 19th May, 2006 in total disobedience of the interim attachment of property order. The ruling of 8th August, 2006, he added, did not sanction the appellant's disobedience of the interim attachment of property order when it ordered that any monies that were due to the defendant by 12th May, 2006 and which had not

been paid out should be used to settle the amount due from the defendant to the respondent before any other creditors of the defendant were considered or any attachment orders were considered. As at 12th May, 2006 the sum of K245,000.00 had been attached, but out of this sum the appellant had only paid the respondent the sum of K100,769.97. On 19th May, 2006, the appellant took out the sum of USD121,714.08 from the defendant's account and paid itself after having received the ex parte order for the interim attachment of property. In addition, the appellant paid direct taxes on behalf of the defendant in the sum of USD133,333.33 on 15th May, 2006.

In her ruling delivered on 17th March, 2010 which gave rise to this appeal, the learned judge reversed her earlier rulings when she held as follows at R14:

> *"The plaintiff's advocate did not draw my attention to the authorities in his list of authorities. If he had done so, I would have given better directives when I made the rulings of 8th August, 2006 and 19th February, 2007. Now I have found good reasons to reverse myself."*

Surprisingly, the appellant never raised this aspect of the ruling as a ground of appeal. Be that as it may, we find it to be a

serious misdirection on the part of the learned judge that we are compelled to raise it as it is fundamental to this appeal. Quite apart from this ruling disclosing the fact that she did not apply her mind to the authorities which were deployed before her (even though she was not obliged to consider them), the judge fell into error when she decided to review her decision because she became functus officio the moment she delivered her rulings of 8th August, 2006 and 19th February, 2007. She therefore ceased to have jurisdiction in so far as the two rulings were concerned. The only limited option which she did not have in this case, was to review the rulings in accordance with Order 39 of the High Court Rules Cap 27 of the Laws of Zambia. We must however point out that there was no application for review or any proof of new evidence which could not have been obtained with due diligence to warrant her to review her two earlier decisions. There was therefore no good reason to reverse her earlier decisions as any dissatisfied party could have appealed.

What then is the status of the ruling of 17th March, 2010 which has been appealed against in relation to the other rulings of

8th August, 2006 and 19th February, 2007? We are of the view that since the learned judge had no power to reverse herself, the ruling of 17th March, 2010 is a nullity. It is accordingly set aside and the earlier rulings which the parties have not appealed against are the only valid and subsisting ones. The parties are granted leave to apply in relation to the rulings of 8th August, 2006 and 19th February, 2007 within 30 days of the date of this judgment before another judge of the High Court. In view of what we have said above, we see no need to deal with the grounds of appeal. This matter is returned to the High Court before another Judge to deal with it. The costs shall abide the outcome of the ruling in the High Court.

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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

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A.M. WOOD
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE