

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

**APP. 26/2019
APPEAL NO.117/2018**

BETWEEN:

FINSBURY INVESTMENT LIMITED

APPELLANT

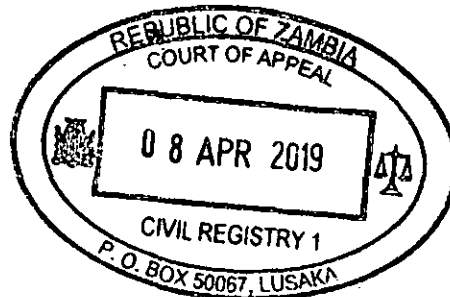
AND

ANTONIO VENTRIGILIA

1ST RESPONDENT

MANUELA VENTRIGILIA

2ND RESPONDENT



Coram: Mulongoti, Sichinga and Lengalenga, JJA

On the 8th day April, 2019

For the Applicants: Mr. J. Sangwa, SC and Mr. J. Chimankata of Messrs Simeza Sangwa and Associates

For the Respondents: Mr. V.B Malambo, SC and Mr. C.M. Sianondo of Messrs Malambo & Co.

Mr. S Sikota, SC and Mr. S Kanda of Messrs Central Chambers

Mr. S. Mambwe and Mr. A. Siwila of Messrs Mambwe, Siwila and Lisimba Legal Practitioners

RULING

Sichinga JA, delivered the Ruling of the Court.

This is a Ruling encompassing two motions by the appellants, Antonio Ventriglia and Manuela Ventriglia.

The first motion is for leave to appeal the Judgement of this Court dated 31st January, 2019 and settled by Order of 29th March, 2019.

The motion is made pursuant to **Order 7 Rule 1(1) of the Court of Appeal Rules**¹ as read together with **Section 13(1) of the Court of Appeal Act**². It was filed into Court on 29th March, 2019 and is supported by an affidavit deposed to by one Antonino Ventriglia, list of authorities and heads of arguments of even date.

According to the supporting affidavit, the applicants contend that the Ruling of the Court dated 29th March, 2019 changed the complexion of the Judgement delivered on 31st January, 2019 and this has triggered the need to appeal to the Supreme Court on a point of law. That the issue which arose for determination is a novel issue without precedent in our jurisdiction thereby making it desirable to be settled on appeal. The proposed thirteen (13) grounds of appeal are set out in the Notice of Motion.

The second motion is for stay of execution of the said Judgment pending the hearing and determination of the application for leave to appeal made pursuant to **Section 13(4) of the Court of Appeal**

Act as read with **Order 10 Rule 5 of the Court of Appeal Rules and Order 59/10/9/B of the Rules of the Supreme Court (White Book)**³. It was filed on the 29th March, 2019 and is supported by an affidavit sworn by the 1st applicant and skeleton arguments of even date.

At the hearing, Mr. Malambo, SC submitted that the single Judge changed the Judgment of the Court of 31st January, 2019 when he executed the order embodying the Judgment on 29th March, 2019 under paragraph (b) which states that:

"(b) the register of members of ZPC shall accordingly be restored, if any changes have been made, to show that the appellant holds 58% of the shares of ZPC and Ital Terrazzo Limited holds 42% of the shares."

This is contrary to the judgment of the Court of Appeal at J40 page 52 of the record of appeal which held: ***"since Ital Terrazo is not a party to this appeal and neither was it in the court below, we shall not make any pronouncement on this factor suffice to say***

that whatever the case, it would not affect the appellant's case as it is a separate entity."

According to counsel by this ***Order of 29th March, 2019*** the Single Judge changed the Judgment of the Court of 31st January, 2019.

Mr. Malambo, SC further submitted that in the judgment of 31st January, 2019, the court relied on repealed law on the definition of 'Registrar' at page J39 which is page 51 of the record of appeal. According to State counsel the definition was changed in 2005 by Act No. 3 which amended the Property Transfer Tax Act, Chapter 340 of the Laws of Zambia.

There are no arguments on behalf of the appellant in opposition to these motions. However, on 3rd April, 2019, the appellant did file a Notice of Motion for an Order to dismiss the respondents' motions for want of jurisdiction pursuant to the inherent jurisdiction of the Court. The Notice of Motion is accompanied by skeleton arguments in support which we have duly noted, and consider them to be in opposition to the respondents' applications.

Briefly, the gist of the respondent's arguments is that the application for leave to appeal which is made pursuant to **Order 7/1/1 of the Court of Appeal Rules and section 13 (1) and (3) of the Court of Appeal Act**. Mr. Sangwa SC, argued that **Order 7/1/1 of Court of Appeal Rules** which reads: "**An interlocutory application under the Act shall be by notice of motion or summons in substantially form III and Form IV respectively, set out in the First Schedule,**" does not grant the Court of Appeal substantive authority to grant leave to appeal to the Supreme Court.

Regarding section 13(1) and (3) State Counsel argued that section 13 (1) repeats what is provided for in **Article 132 (2)** of the constitution that: "**an appeal from a decision of the Court of Appeal shall be made to the Supreme Court with leave of the Court of Appeal.**"

And, that **Section 13 (3)** sets out what shall be considered by the Court of Appeal in deciding whether to grant leave to appeal to the Supreme Court or not. It was the further submission of State

Counsel that section 13(2) stipulates that an application for leave to appeal shall be made within 14 days. According to State Counsel the respondent's application for leave has been made outside 14 days and we should not entertain it. Mr. Sangwa, SC amplified that the 14 days expired on 14th February, 2019 as the Judgment date is 31st January, 2019. The respondent's application for leave was made on 29th March, 2019. That the judgment of 31st January, 2019 is the subject of the appeal as is evident from the proposed grounds of appeal except for two which are against the order of 29th March, 2019. We thus lack jurisdiction to entertain the application.

Regarding the Order of 29th March, 2019 Mr. Sangwa, SC maintained that time started running after the Judgment and not the Order. That the Court of Appeal Rules require that the Judgment of the Court be embodied in an Order. According to State Counsel, the Order embodying the judgment cannot be subject of an appeal, as it has no existence of the Judgment.

At the hearing, Mr. Sangwa, SC submitted that the respondents should have actually moved the full Court to vary, reverse or set aside the Ruling or Order of the single Judge in accordance with section 9 of the Court of Appeal Act, instead of seeking leave to appeal to the Supreme Court. He also submitted that the application for a Stay is misconceived as it should be made after leave has been granted.

In response to the arguments on section 9, Mr. Malambo, SC submitted that the section deals with interlocutory applications and not an Order/Ruling of a single Judge dealing with the appeal as *in casu*.

He further submitted that time begun to run on 29th March, 2019 after the Order of the single Judge. That it is the Order which prompted the appeal as the Judge changed the judgment of the Court.

We have carefully considered the applications together with the authorities cited and oral submissions by learned counsel for the

parties. We wish to state from the outset that we are inclined to dismiss the appellant's motion to dismiss the respondents' application for leave to appeal to the Supreme Court on grounds that we have no jurisdiction as the application for leave to appeal was made outside the 14 days of the date of Judgment being 31st January, 2019. We are of the considered view as argued by Mr. Malambo, SC that when embodying the Judgment into an Order, the single Judge was dealing with matters involving the appeal and not interlocutory matters. The Order as argued is what prompted the appeal, as it appears to have changed the Judgment of 31st January, 2019. Time therefore began to run on 29th March, 2019 and so the application for leave to appeal was made within time, and we shall consider it.

Leave to appeal may only be granted if the Court is satisfied that at least one of the conditions stipulated in **Section 13 of the Court of Appeal Act** is satisfied. **Section 13 (3)** provides as follows:

"The Court may grant leave to appeal where it considers that -

(a) the appeal raises a point of law of public interest;

(b).....

(c) the appeal would have a reasonable prospect of success: or

(d) there is some other compelling reason for the appeal to be heard."

The applicants contend that the appeal sought is on a point of law and that the issues raised are novel.

We have considered whether the circumstances of this case meet the conditions stipulated in **Section 13(3) (a)(c) and (d)** of the **Court of Appeal Act** in order for us to grant leave to appeal in accordance with **Order 11** of the Court of Appeal Act.

In our Judgement, we addressed all the issues that relate to the dispute in so far as the shareholding of Zambezi Portland Cement Limited is concerned. However, from the submissions made and some of the proposed grounds raised, it is alleged that the effect of the Order of the single Judge granted on 29th March, 2019 amended the Judgment of the Court under the guise of **Order 10 Rule 23 of the Court of Appeal Rules**. We are satisfied that this is a compelling reason to have the law settled by the Supreme Court and that it is a point of law of public importance as to the proper

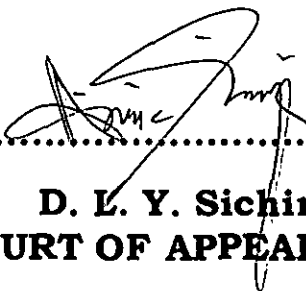
approach of the Court of Appeal Rules in respect of such a challenge. We accordingly grant leave to appeal to the Supreme Court.

Having found a basis on which to grant leave to appeal to the Supreme Court, we equally grant an order to stay execution of the Court's Judgement pending the hearing and determination of the appeal.

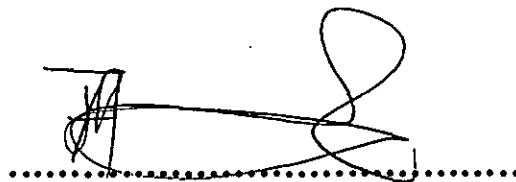
Delivered at Lusaka the 8th day of April, 2019.



J. Z. Mulongoti
COURT OF APPEAL JUDGE



D. L. Y. Sichinga
COURT OF APPEAL JUDGE



F.M. Lengalenga
COURT OF APPEAL JUDGE