

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

NOM/45/2018
CAZ/08/263/2017

BETWEEN:

ZESCO LIMITED

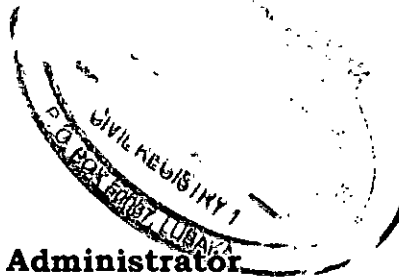
APPELLANT

AND

ELIJAH NYONDO

RESPONDENT

**(Suing in the capacity as Administrator
of the estate of the late Wilson Sinyinza)**



Coram: Makungu, Sichinga and Ngulube JJA

**On the 6th day of February, 20th February and the 3rd day of April,
2019**

For the Appellant: Mr. D. Mazumba of Messrs Douglas and Partners.

For the Respondent: Mr.K. Mweemba and Ms. M. Kamole - In house Counsel.

RULING

Sichinga, JA delivered the Ruling of the Court.

Cases referred to:

- 1. Zesco Limited v. Ethel Mkandawire CAZ 80/2017*
- 2. Base Properties Limited v. Nachilima Chileshe SCZ 211/2015*
- 3. Zambia Railways Limited v. Flake (1973) ZR 319*

4. *Mususu Kalenga Building Limited, Winnie Kalenga v. Richmans Money Lenders' Enterprises SCZ No. 4 of 1999*
5. *Twampane Mining Cooperative Society v. E and M Storti Mining Limited (2011) ZR 67 Vol 3*

Legislation referred to:

1. *Court of Appeal Act No. 7 of 2016*
2. *The Court of Appeal Rules, Statutory Instrument No. 65 of 2016*
3. *Rules of the Supreme Court, 1999 Edition (White Book)*
4. *Intestate Succession Act Chapter 59 Laws of Zambia*
5. *Fatal Accidents Act 1846*

In this ruling, we shall refer to the respondent as the applicant and the appellant as the respondent as these are their correct designations in the application before us. By Notice of Motion pursuant to **Section 13(2) and (3) of the Court of Appeal Act No. 7 of 2016¹** and **Order 11 Rule 1 of the Court of Appeal Rules 2016²**, the applicant seeks leave to appeal against the Judgment of the Court delivered on 4th September, 2018 in Appeal No. 114 of 2017. The proposed grounds stated in the affidavit in support are as follows:

1. **That the Court below erred in law and fact when it held that "the position taken by the trial court that everyone in**

the group was doing something beyond their scope is therefore not only speculative but erroneous, " when in actual fact there was a report to that effect done by the respondent and also the respondent's witness evidence was to that effect.

2. That the Court below erred in law in holding that the respondent successfully established its defence of volenti non-fit injuria when such a defence is only available if the employer shares no blameworthiness.
3. That the Court below also erred in law in upholding the defence of non-fit injuria when they must have first obtained a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur.
4. That the court below erred in law and fact when it upheld the defence of volenti non-fit injuria despite not establishing any act of blameworth done by the appellant which caused the live transmission of electricity and the spark which caused electrocution.

According to the supporting affidavit, sworn by the applicant, Elijah Nyondo, the proposed appeal is raised on a point of law and the belief that the proposed appeal has high prospects of success bearing in mind the serious issues raised in the proposed memorandum of appeal.

At the hearing, Mr. Mazumba, Learned counsel for the applicant relied on the record of the motion including the skeleton arguments, the affidavit in reply filed on 15th February, 2019 and the arguments in response dated 14th February, 2019. In his oral submissions he endeavoured to contend that the Court had come to an erroneous finding of fact when it reversed the trial court's finding that everyone in the group was doing something beyond their scope. On the issue of *volenti non-fit injuria*, counsel relied on the detailed submissions contained in the skeleton arguments, which we have duly noted.

Mr. Mazumba further addressed the Court on the point of law raised at the hearing of this motion by the respondent relating to this Court's jurisdiction to hear the motion on account of the

applicant not having been a duly appointed administrator of the estate of the late Wilson Sinyinza. Counsel pointed out that the applicant's order of appointment had been exhibited in the affidavit in reply. His submission was that the motion could not be defeated on account of this. In support of this submission reference was made to **Order 20/8/18 Rules of the Supreme Court of England³, Zesco v. Ethel Mkandawire¹, and Base Properties Ltd v. Nachilima Chileshe²**. It was counsel's submission that the aspect of appointment of an administrator go to the distribution of the estate. That since the applicant now has an order of appointment from the High Court, the proceedings cannot be annulled.

The motion was opposed by the respondent in its affidavit filed on 26th October, 2018 and skeleton arguments of even date. In opposing the motion, Mr. Mweemba, learned counsel, for the respondent herein made oral submissions on the point of law relating to jurisdiction. He submitted that this issue is premised on **Order 59/10/6 Rules of the Supreme Court** which allows a party to raise a point of law relating to jurisdiction. Notwithstanding the

fact that the applicant has obtained letters of administration, these proceedings are a nullity because the applicant did not have any authority to commence the action. Counsel relied on the cases of ***Base Properties supra and Zambia Railways v. Fluke***³. The import of these authorities is that an administrator derives his authority from a grant of administratorship and further that a step taken by a person without authority is a nullity.

Mr. Mweemba further submitted that where a statute provides for procedural requirements, it is mandatory to adhere to those requirements. That provisions of **section 24 of the Intestate Succession Act**⁴ and **section 2 of the Fatal Accidents Act**⁵ were mandatory and cannot be cured by **Order 20 /8/18 Rules of the Supreme Court**, as this would violate the principle of **section 3 of the Intestate Succession Act** which provides that a person becomes an administrator when letters of administration are granted.

In reply, Mr. Mazumba reiterated his earlier submissions.

We have considered the point of law raised, the application, and authorities cited by both parties. We do not consider that the arguments on the respondent's point of law on jurisdiction are appropriate in the present motion. The point of law on jurisdiction or capacity of the applicant herein was neither raised in the court below nor on appeal before us. The case of ***Mususu Kalenga Building Limited, Winnie Kalenga v. Richmans Money Lenders' Enterprises*** ⁴ is authority for the proposition that an issue not raised in the court below cannot competently be raised in the appellate court. We shall therefore not proceed to determine the issue of jurisdiction as it might lead to us reviewing our own judgment, which jurisdiction we lack.

The application for our consideration is for leave to appeal to the Supreme Court. **Order 11 Rule 1(1) of the Court of Appeal Rules** provides that;

"An appeal from a judgment of the Court should be made to the Supreme Court with leave of the Court."

Section 13 (3) of the Court of Appeal Act provides that:

climb the ladder but he insisted on helping to pull the cable. We found this not to be consistent with the notion that he was under an obligation to participate in the installation.

On the issue of *volenti non-fit injuria*, our finding was that notwithstanding the supervisor walking away from the site, the deceased freely aided and abetted his fellow servants' disobedience and in so doing, he voluntarily put himself in harm's way which led to his eventual death.

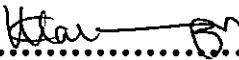
As to whether the appeal raises a point of law of public importance, we are of the view that the appeal does not raise any matter of public interest. There is no question of importance or general policy upon which a further decision of the Supreme Court would be to the public advantage or any compelling reason for us to allow the application.

In the case of ***Twampane Mining Cooperative Society Limited v. E and M Storti Mining Limited***⁶ the Supreme Court stated the following:

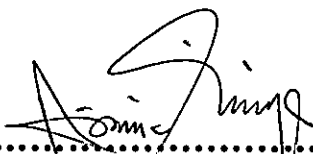
"Indeed, there is no need to appeal for the sake of appealing when the appeal has no prospect of success"

In *casu*, we hold the view that the proposed appeal has no prospects of success as it does not meet the threshold set by **Section 13(3) a, b, c and d of the Court of Appeal Act.**

We accordingly refuse to grant the sought leave to appeal with costs to the appellant to be taxed in default of agreement.

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**C. K. Makungu
COURT OF APPEAL JUDGE**

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**D. L. Y. Sichinga
COURT OF APPEAL JUDGE**

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**P. C. M. Ngulube
COURT OF APPEAL JUDGE**