

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

CAZ/08/430/2023

BETWEEN:

BANK OF ZAMBIA

APPELLANT

AND

**AL SHAMS BUILDING MATERIALS
COMPANY LIMITED**

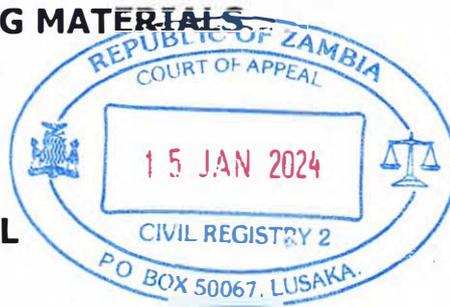
1ST RESPONDENT

JAYESH SHAH

2ND RESPONDENT

ATTORNEY GENERAL

3RD RESPONDENT



CORAM: Chashi, Ngulube and Muzenga, JJA
On: 3rd May 2023 and 15th January 2024

For the Appellant:

Mr. B. C. Mutale, SC, Ms. M. Mukuka & Mr.
T. Kasweji of Messrs Ellis & Co.

For the 1st Respondent:

Mr. M. Lisimba of Messrs Mambwe, Siwila &
Lisimba Advocates, Mr. N. Yalenga of
Messrs Nganga Yalenga Advocates, Mr. L.
Mwamba & Mr. M. Dessai of Messrs
Mwamba & Millan Advocates, Mr. M.
Ntanda of Messrs Reagan Blankfein Gates
Legal Practitioners, Mr. E. Siatwambo of
Messrs FB Nanguzyambo & Associates &

Mr. Musonda of Messrs Mulilansolo
Chambers

For the 2nd Respondent: In person
For the 3rd Respondent: Not in attendance

R U L I N G

Muzenga, JA, delivered the Ruling of the Court.

Cases referred to:

- 1. Marsh v. Marsh (1945) AC 271**
- 2. Macfoy v. United Africa (1961) 3 ALL ER 1169**
- 3. Hadkinson v. Hadkinson (1952) 2 ALL ER 567**
- 4. Chainama Hills Golf Club Limited v. Golf Consultancy and Tourism Limited – CAZ/08/19/2022**
- 5. R (on the application of Majera (formerly SM (Rwanda))) v. Secretary of State for the Home Department [2021] UK SC 46**
- 6. First Merchant Bank Zambia Limited (in liquidation) & Attorney General v. Al Shams Building Materials Co. Ltd – SCZ/8/258/2009**
- 7. First Merchant Bank Zambia Limited (in liquidation) & Attorney General v. Al Shams Building Materials Co. Ltd & Jayesh Shah – SCZ Judgment No. 35 of 2018**

Legislation referred to:

- 1. The Court of Appeal Rules, Statutory Instrument No. 65 of 2016.**
- 2. The Court of Appeal Act, No. 7 of 2016.**
- 3. The Rules of the Supreme Court of England, 1999 Edition.**

1.0 INTRODUCTION

1.1 This is a ruling on the respondent's notice of motion to raise a preliminary objection/issue on a point of law pursuant to **Order 13 Rule 5(1)** as read with **Order 7 Rule 1(1) of the Court of Appeal Rules (CARs)**.

1.2 The parties filed affidavits, skeleton arguments, for and against the applications.

2.0 BACKGROUND

2.1 The background to this application is that the 1st and 2nd respondents commenced a matter against the appellant and the 3rd respondent in which they claimed the sum of USD139,191,386.74. Musona, J, entered Judgment in favour of the 1st and 2nd respondent for the aforementioned amount. In his Judgment, Musona, J, granted leave to appeal subject to the appellant paying into court 30% of the judgment sum within the period within which an appeal could be lodged.

2.2 The appellant then proceeded to file a notice and memorandum of appeal against the said judgment despite not complying with the condition placed by the lower court.

2.3 The 1st respondent raised a preliminary objection, the gist of which is to challenge the competence of the appeal in the light of the

appellant not complying with the condition precedent. The motion was before a single Judge of this Court, who thought it fit that the motion be determined by the full court pursuant to **Order 10 Rule 6 of the Court of Appeal Rules (CARs)**, as it related to a portion of the judgment of the lower court appealed against.

2.4 We heard the motion culminating into this Ruling.

3.0 1ST RESPONDENT'S ARGUMENTS

3.1 Learned counsel for the 1st respondent in support of the motion, submitted that the appellant's entire purported appeal is incompetently before this court and ought to be dismissed. It was counsel's contention that the appellant contumeliously disregarded a mandatory order of the lower court to pay 30% of the judgment debt before filing the appeal.

3.2 Counsel argued about peremptory and unless orders that the court may make which must be complied with before a litigant can take a further step in the cause. Learned counsel equally referred to the fact that jurisdiction is donated without which what a court does is as good as nothing. We were referred to a plethora of cases in support of these arguments, among them the cases of **Marsh v. Marsh**,¹ **Macfoy v. United Africa**² and **Hadkinson v. Hadkinson**.³

- 3.3 Learned counsel emphasized that an order of court whether regular or not must be complied with. Counsel ended by submitting that there is no appeal before us and that we have no jurisdiction to hear the appeal.
- 3.4 It was counsel's prayer that the appeal be dismissed with costs to the 1st respondent.

4.0 2ND RESPONDENT'S ARGUMENTS

- 4.1 The 2nd respondent acting in person supported the 1st respondent's motion. He argued that the appellant not having appealed against the condition given by the lower court, was bound by it. He referred us to a plethora of authorities in support of arguments which were in the main, similar to those advanced by the 1st respondent.
- 4.2 He ended by submitting that the appellant was bound to follow orders of court and had no authority to decide which ones are *void ab initio* and or a nullity.

5.0 APPELLANT'S ARGUMENTS IN OPPOSITION

- 5.1 Learned counsel for the appellant contended that the order of the court below granting leave to appeal subject to payment of 30% into court was *void bi initio* and not bound to be obeyed. Reliance was placed on the case of **Chainama Hills Golf Club Limited v. Golf Consultancy and Tourism Limited**⁴ delivered by a single

Judge of this Court in which the High Court denied leave to appeal, when such leave was not required. The single Judge held that all the appellant needed to do was to file the notice and memorandum of appeal.

- 5.2 It was counsel's submission that once an act is void, there is no need for an order of the court to set it aside. We were referred to the case of **Macfoy** *supra* and other cases in support of their arguments.
- 5.3 It was counsel's prayer that the 1st respondent's preliminary objection be dismissed with costs.

6.0 THE HEARING

- 6.1 At the hearing of this motion, the parties informed the court that they would rely on their various filed documents and augmented briefly.

7.0 DECISION OF THE COURT

- 7.1 We have carefully considered the applicant's Notice of Motion to raise a preliminary objection, affidavits, skeleton argument for and against the motion. We are grateful to the parties for their arguments, though some of them were unnecessarily too long with numerous authorities, which we have nonetheless taken into consideration in reaching our verdict. This motion raises a

fundamental question of how to approach a court order which is irregular, erroneous, illegal or a nullity?

- 7.2 There is clearly no doubt that the judgment of the court below was not interlocutory, neither was it a second appeal so as to require leave of court before launching an appeal to this court. It was a final judgment in which either of the parties had an unfettered right to appeal to this court. **Section 22 of the Court of Appeal Act No. 7 of 2016** (the Act) provides that:

“Subject to section twenty-three, an appeal in a civil matter shall lie to the Court from a judgment of the High Court or a quasi-judicial body.”

- 7.3 The marginal note to the foregoing section reads: **“Right of appeal in civil matters.”** This Section therefore confers the right of appeal to a dissatisfied party against a judgment of the court below. The exceptions or restriction to this right are provided in **Section 23** of the **Act**. We shall reproduce the Section for avoidance of doubt:

“23. (1) An appeal shall not lie—

- (a) from an order allowing an extension of time for appealing from a judgment;**
- (b) from an order of a judge of the Court giving unconditional leave to defend an action;**

- (c) from a judgment given by the High Court in the exercise of its appellate or review jurisdiction, without the leave of the High Court or, if that has been refused, without the leave of a judge of the Court;**
- (d) from an order made with the consent of the parties or from an order as to costs only, which by law is left to the discretion of the court or quasi-judicial body, without the leave of the court or of the judge who, or quasi judicial body which, made the order or, if that has been refused, without the leave of a judge of the Court;**
- (e) from an order made in chambers by a judge of the High Court or by a quasi-judicial body or from an interlocutory order or interlocutory judgment made or given by a judge of the High Court or by a quasi-judicial body, without the leave of that judge or quasi-judicial body or, if that has been refused, without the leave of a judge of the Court, except in the following cases:**

 - (i) where the liberty of the subject or the custody of infants is concerned;**
 - (ii) where an injunction or the appointment of a receiver is granted or refused;**
 - (iii) in the case of a decision determining the claim of a creditor or the liability of any contributory, director or other officer under the Companies Act;**

- (iv) in the case of a decree nisi in a matrimonial cause, judgment or order in an Admiralty action determining liability; or
 - (v) in the case of an order on a special case stated under any law relating to arbitration; and
 - (f) from an order absolute for the dissolution or nullity of marriage made by a judge of the High Court in favour of a party who, having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree.
- (2) An order refusing unconditional leave to defend an action is not an interlocutory order or interlocutory judgment within the meaning of paragraph (e) of subsection (1)."

7.4 It is clear therefore that the within decision of the lower court does not fall within the foregoing restrictions. It thus required no leave for any party to appeal. We therefore have no hesitation in holding that the lower court did not have jurisdiction to make the order that it did. The court had no power to alter, take away or interfere with a dissatisfied party's right to appeal. Therefore, the order of the lower court granting leave to appeal subject to payment of 30% of the judgment debt is a nullity. It is as good as if it was not made, for *out of nothing, nothing comes (ex nihilo nihil fit)*. We

find force in the dictum by Lord Denning in the **Macfoy** case *supra* in which he stated that:

“The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court, to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there.”

- 7.5 The question therefore is: what should a party faced with such an order do? In our jurisdiction however, an order of the court must be obeyed whether perceived to be a nullity, illegal, void, irregular or for other similar reasons until it has been vacated or set aside by the same court or on appeal. This was the position recently taken by the the Supreme Court of the United Kingdom in the case of **R (on the application of Majera (formerly SM (Rwanda)) v. Secretary of State for the Home Department**⁵ where the court confirmed the well-established principle of UK constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or overruled by legislation), notwithstanding any legal defects in the order.

- 7.6 It will be a recipe for confusion if parties are allowed in their wisdom or lack of it to conclude that the order made by a court is a nullity, illegal, void or irregular and choose to disregard it. This would water down the efficacy of the administration of justice, erode the sanctity of the judicial office and possibility turn the judicial system into a mockery.
- 7.7 By the same token, we expect judicial officers bequeathed with the exercise of judicial power on behalf of the people to do so diligently to avoid making illegal or void orders as was in *casu*. A puisne Judge is expected to know the provisions of **Sections 22** and **23** of the **Act** and not make a day light blunder such as the one in *casu*. These are very basic provisions. It is therefore difficult to fathom that the learned Judge herein could make such an error. Be that as it may, we note that errors are made, even for courts which do not sit alone. We however hope that our sentiments will be taken seriously by adjudicators.
- 7.8 We wish to guide trial courts that whenever they feel compelled to make an order which is strange or unusual, they must search the law diligently before embarking deep in unknown waters to avoid fishing out the unfathomable.

7.9 We now wish to comment on granting conditional leave in cases where leave to appeal is required by law. There is no provision in our Rules or the Rules of the court below for the grant of conditional leave. There is further no such provision in the **Rules of the Supreme Court of England, 1999 Edition**. It would however appear that the same may be made following the decision of the apex court in the case of **First Merchant Bank Zambia Limited (in liquidation) & Attorney General v. Al Shams Building Materials Co. Ltd⁶**, where the appeal was dismissed for failure to comply with the condition to pay the judgment debt into court (reference to this judgment was made in the case of **First Merchant Bank Zambia Limited (in liquidation) & Attorney General v. Al Shams Building Materials Co. Ltd & Jayesh Shah⁷**, in paragraph 2.15 at J13).

7.10 It would appear therefore that conditional leave may be made in cases where *ipso facto* leave to appeal is required. We must hasten to add therefore that conditional leave should be ordered very sparingly if at all. It should be in extraordinary circumstances such as one in which the intended appellant clearly wishes to use the appeal process to circumvent the course of justice. Before taking such a course of action a court must undertake a meticulous analysis

justifying the imposition of the condition. This is in order to avoid haphazard and spontaneous orders, which may have the effect of technically denying the leave purported to have been granted.

7.11 Notwithstanding the foregoing, we urge trial courts not impose conditions on granting leave to appeal. A court should either grant leave or not grant leave, in instances where leave is required.

7.12 We have already held that the conditional leave ordered by the lower court is void for all intents and purposes. As an appellate court we declare it a nullity and set it aside. Having found it to be a nullity, we therefore consider the appeal to be competently before us since the conditional leave was null and void. It is as good as if it was not made. Meaning therefore that even though the appellant disobeyed the lower court's order, the appeal is valid as the order was *void ab initio*. As a consequence, we dismiss the 1st respondent's preliminary objection.

7.13 The matter does not end there. We have stated that orders of court must be obeyed at all times, whether perceived by the parties to be void, illegal or irregular until the order has been set aside or vacated. It is clear therefore that the appellant disobeyed an order of court and cannot go '**scot free.**' We order costs of this application to be

paid by the appellant to the 1st respondent to be taxed in default of agreement.

7.14 We urge the parties that whenever they are faced with an order, which on the face of it appears to be illegal, void or irregular, to move the court that made it to vary, vacate or set it aside. If that fails, appeal against the order and in the process seek to stay its operation pending the determination of the appeal.

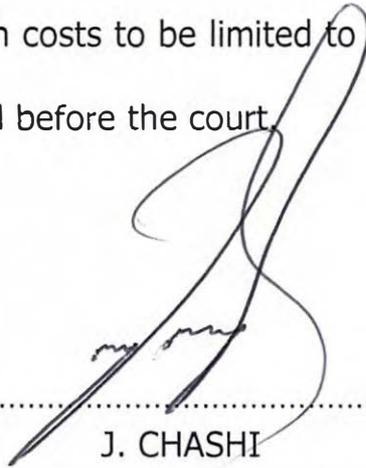
7.15 It came to our attention that **Application No. 003 of 2023** was consolidated with this application by another panel of this court. At the time of the consolidation, we had already heard the application and reserved the ruling. The only aspect of **Application 003/2023** which has been resolved by this ruling is the one concerning the failure to comply with the order to pay 30% of the judgment sum. We in the circumstances refer the determination of the issue relating to the manner in which the record was prepared to the panel of this court before which it came up for hearing.

8.0 CONCLUSION

8.1 Having found the preliminary objection to be without merit, we dismiss it.

8.2 We award costs of this application to the 1st respondent against the appellant to be paid forthwith and to be taxed in default of

agreement. The within costs to be limited to three (3) senior most counsel who appeared before the court.



J. CHASHI

COURT OF APPEAL JUDGE



P. C. M. NGULUBE

COURT OF APPEAL JUDGE



K. MUZENGA

COURT OF APPEAL JUDGE