

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO. 127/2016

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ROAD TRANSPORT AND SAFETY AGENCY

APPELLANT

AND

FIRST NATIONAL BANK ZAMBIA LIMITED

1ST RESPONDENT

JOSEPHINE MILAMBO

2ND RESPONDENT

CORAM : Mambilima CJ, Malila and Mutuna, JJS

On 7th May 2019 and 28th May 2019

For the Appellant : Mr. A. Tembo, in-house counsel for the Appellant

For the First Respondent : Ms G. Musyani and Mr. M. Moonga, Legal counsel and Legal manager, respectively, for the First Respondent

For the Second Respondent : N/A

J U D G M E N T

MUTUNA, JS. delivered the judgment of the court.

Cases referred to:

- 1) The Attorney General v E. B. Jones Machinists Limited (2000) ZR 114
- 2) Aristogerasimos Vangelatos and Vasiliki Vangelatos v Metro Investments Limited, King Quality Meat Products, Demetre

Vangelatos and Maria Likiardo Poilou, SCZ Judgment number 35 of 2016

3) Chikuta v Chipata Rural Council (1974) ZR 303

Legislation referred to:

- 1) Road Traffic Act, Number 11 of 2002**
- 2) Sheriffs Act, Cap 37**
- 3) The Rules of the Supreme Court, 1965**

Works referred to:

- 1) The Merits of the Civil Action for Breach of Statutory Duty, by Neil Foster, The Sydney Law Review, by the Sydney Law School, 2011.**

Introduction

- 1) This appeal emanates from the judgment of a Learned High Court Judge which awarded damages to the First Respondent against the Appellant for failing to consult the First Respondent before transferring ownership of motor vehicle, registration number ALK 4829 (the vehicle) from the First Respondent and Bert Motors and General Dealers Limited (BMGDL) as absolute owner and owner, respectively, to the Second Respondent. The Learned High Court Judge, found that the actions by the Appellant contravened the provisions of Section 13 of the

Road Traffic Act and they resulted in the First Respondent being unlawfully deprived of its property.

- 2) The Appeal discusses the functions and purpose of the Appellant's motor vehicle register and the effect of the registration of an absolute owner and owner on the certificate of registration of a vehicle. It also discusses the jurisdiction of the High Court where it is moved by the wrong process and effect of a judgment rendered in such circumstances.

Background

- 3) The backdrop to this appeal is that the First Respondent had extended a loan facility to one of its customers, BMGDL, sometime in 2015.
- 4) The purpose of the loan was, among other things, to enable BMGDL purchase the vehicle and the security provided to the First Respondent by BMGDL was a lease over the said vehicle. For this purpose, the registration book of the vehicle revealed BMGDL as the owner and First Respondent as absolute owner.

- 5) During the life of the loan facility, an action was instituted against BMGDL by Hashi Energy Zambia Limited in the High Court Commercial Division (erstwhile Commercial List) under cause number 2013/HPC/454. The action resulted in a judgment on admission being entered against BMGDL by Hashi Energy Zambia Limited on 14th November 2013 in the sum of K214,875.50 plus interest.
- 6) In pursuance of the aforestated judgment on admission, Hashi Energy Zambia Limited caused to be issued a writ of *feri facias* against BMGDL, commanding the Sheriff of Zambia to collect the goods of BMGDL and auction them for purposes of realizing the judgment sum of K214,875.50 plus interest.
- 7) In the process of executing the writ of *feri facias*, the Sheriff of Zambia seized the vehicle from BMGDL and sold it to the Second Respondent at a public auction for the sum of K70,000.00.
- 8) After purchasing the vehicle the Second Respondent had difficulty changing ownership to her name because of the

security of the lease registered in the register at the Appellant's registry. However, the Sheriff's office intervened by explaining the background to the Second Respondent's purchase of the vehicle and that as a result of the seizure and auction, the Appellant was obliged to change ownership from BMGDL and the First Respondent without having regard to the interest of the latter. Following from this explanation, the Appellant transferred ownership of the vehicle to the Second Respondent.

- 9) After the First Respondent realized that it had lost the vehicle it took out an action against the Appellant and Second Respondent in the High Court. The two were First and Second Defendant respectively.

The First Respondent's claim against the Appellant and Second Respondent

- 10) The First Respondent took out the action in 2014 by way of writ of summons and statement of claim. The claim as

endorsed on the writ of summons was for the following relief:

10.1 A declaration that the actions of the 1st Defendant in completing the change of ownership in motor vehicle Ssangyong Rextone 4WD SUV registration number ALK 4829 from the Plaintiff to the 2nd Defendant are *ultra vires* its powers as provided in the Road Traffic Act No. 11 of 2002 or otherwise unlawful;

10.2 An order that the 1st Defendant de-registers the name of the 2nd Defendant as owner of the Ssangyong Rexton 4WD SUV registration ALK 4829 and re-register the Plaintiff as absolute owner thereof;

10.3 An order that the 2nd Defendant returns to the Plaintiff the motor vehicle, being Ssangyong Rexton 4WD SUV registration ALK 4829;

10.4 Damages

10.5 Costs

10.6 Any further relief that the Court may deem fit.

- 11) The First Respondent's contentions as contained in the statement of claim were that in the course of conducting its lawful business it had advanced a credit facility to its customer BMGDL to enable it purchase five assets one of which was the vehicle.

- 12) The credit facility was secured by a lease over the vehicle as a consequence of which, the First Respondent was named as the absolute owner and BMGDL as owner in the registration book of the vehicle. The registration book was issued by the Appellant as custodian of the register of motor vehicles and trailers.
- 13) As a result of the facts in the preceding paragraph, the Appellant was at all material times aware of the First Respondent's interest in the vehicle.
- 14) The contentions went on to reveal how the vehicle was seized and sold pursuant to a writ of *feri facias* issued under cause number 2013/HPC/454 following which it was registered in the name of the Second Respondent without the First Respondent's consent. These facts prove that the Appellant was in breach of the statute that governs its affairs which requires it to consult the absolute owner before effecting a change of ownership.
- 15) The willful breach by the Appellant as described in the preceding paragraph is a derogation of the duty it owed

to the First Respondent resulting in its being deprived of it right to the vehicle.

The Appellant's defence in the Court below

- 16) In its response to the First Respondent's contentions, the Appellant did not deny that its register reflected the First Respondent as absolute owner and BMGDL as owner of the vehicle, nor did it deny effecting the change of ownership of the vehicle to the Second Respondent.
- 17) The Appellant justified its actions by stating that it was prompted by the documentation presented to it by the Second Respondent which revealed that she had purchased the vehicle at a public auction conducted by the Sheriff of Zambia. Further, it received instructions from the Sheriff of Zambia on 28th March 2014 to effect the change of ownership of the vehicle.
- 18) As a result, the Appellant denied the First Respondent's claim in its entirety and put the First Respondent to strict proof thereof. In doing so, it contended that whatsoever loss the First Respondent may have suffered

was a consequence of the actions by the Sheriff of Zambia.

Second Respondent's defence in the Court below

- 19) In her defence, the Second Respondent contended that she was a bonafide purchaser of the vehicle, for value and without notice of any encumbrance over it. She contended further that the change of ownership into her name was done legally with supporting documents from the Sheriff of Zambia.

Determination of the matter by the High Court and Decision.

- 20) The Learned High Court Judge considered the contentions of the parties, evidence and arguments and found that the issues that stood to be determined were: whether the Appellant, acting through its officer acted contrary to the law when it changed ownership in the vehicle from the First Respondent's name as absolute owner and BMGDL as owner into the name of the Second

Respondent; and whether, the Second Respondent is a bonafide purchaser for value without notice.

- 21) In addition, the Learned High Court Judge noted the fact that the vehicle was registered in the names of the First Respondent and BMGDL and the fact that it had been in the physical custody of BMGDL. As a consequence of such custody, any judgment creditor was at liberty to levy execution against BMGDL to recover any debt owed to such judgment creditor by BMGDL.
- 22) Arising from the findings in the preceding paragraph the Learned High Court Judge noted further that the seizure of the vehicle from BMGDL by the Sherrif of Zambia was as a result of a writ of *fieri facias* issued under cause number 2013/HPC/455, following a judgment in favour of Harshi Energy Zambia Limited to recover the sum of K214,875.50. He then considered the evidence tendered by the Sheriff of Zambia on behalf of the Second Respondent that as a consequence of the writ of *fieri facias*, the vehicle became the property of the Court. As such, at the time of change of ownership, the licensing

officer had no obligation to obtain consent from the owners of the vehicle.

- 23) The Learned High Court Judge rejected the evidence by the Sheriff of Zambia and found that whenever the Sheriff of Zambia undertakes any seizure of property he acts as agent of the party at whose instance the writ of execution is issued. The Judge relied on Section 14(2) of the ***Sheriffs Act*** and our decision in the case of ***The Attorney General v E. B. Jones Machinists Limited***¹ where we interpreted the provisions of that Section. He thus held that ownership of the seized goods vests in the judgment creditor and not the Court. Further, where the judgment debt is in monetary terms, the seizure of a judgment debtor's chattels is intended to have the same sold for purposes of realizing the monetary value of the judgment sum which is paid to the judgment creditor. In addition, even where the seized chattels are what constitute the subject matter of the judgment, there has to be a change of ownership from the judgment debtor to the judgment creditor and a new certificate of registration

issued in that regard. He thus concluded that ownership of a seized chattel changes at the point of registration and not seizure.

- 24) Following from the foregoing, the Learned High Court Judge then went on to consider the legality of the change of ownership effected on the vehicle. He began by finding that BMGDL as owner of the vehicle held it subject to certain conditions while the First Respondent as absolute owner had perfect title to the vehicle. Therefore, BMGDL had no authority to dispose of the vehicle for as long as it had not discharged its obligation to the First Respondent.
- 25) The Judge held that the First Respondent as absolute ownership had a superior title to BMGDL as owner and for this reason, the proviso to Section 13 of the **Road Traffic Act** requires a licencing officer to consult the absolute owner before registering another person as owner of the vehicle. He declined to accept the evidence by the Second Respondent's witness that the documents evidencing the sale of the vehicle pursuant to which the change of ownership was done superseded the

requirements under Section 13(1)(B) of the **Road Traffic Act**. This holding was based on his finding that the requirements under the proviso to consult the absolute owner was a mandatory one.

26) The Learned High Court Judge also rationalized the need to consult the absolute owner as being intended to safeguard such owner from unscrupulous persons. He also refused to accept the evidence by the Second Respondent's witness to the effect that the advert placed in the print media informing the public of the Sheriff's intention to sell the vehicle negated the proviso to Section 13. The basis for this was a finding he made that the First Respondent may not have seen the advert. He concluded that by its action of registering the vehicle in the Second Respondent's name, the Appellant unlawfully deprived the First Respondent of its property.

27) The Learned High Court Judge then considered the next issue which was whether or not the Second Respondent acquired good title to the vehicle having regard to the fact that she complied with the procedure for purchasing

property at a public auction and change of ownership at the Appellant's registry. In determining the issue the Judge held that there is no obligation placed upon a buyer at an auction sale to ascertain who the owner of the goods being auctioned is or to seek the permission of such owner when registering the change in ownership of a vehicle. He thus found that the Second Respondent acquired good title to the vehicle and held that she was entitled to retain ownership of the vehicle. In doing so and having found that it was the Appellant which was at fault, the Learned High Court Judge awarded damages to the First Respondent against the Appellant. The basis for this was that the latter caused the loss of the former's security pledged by BMGDL.

The grounds of appeal to this Court.

- 28) The Appellant is aggrieved by the decision of the Learned High Court Judge and has launched this appeal on four grounds as follows:

- 28.1 The Learned trial Judge erred in law and fact when he found that failure by the Appellant to get consent from the First Respondent before changing ownership of motor vehicle Ssangyong Rexton 4WD SUV registration mark ALK 4829 to the Second Respondent caused the First Respondent to lose its security for the facility availed to Bert Motors Limited when there was evidence to show that the security was lost at the time when the vehicle was sold by the undersheriff at Ndola;
- 28.2 The Learned trial Judge erred in law and fact when he found that the First Respondent lost its security in motor vehicle Ssangyong Rexton 4WD SUV registration mark ALK 4829 at the point that the Appellant changed ownership of the vehicle into the name of the Second Respondent as opposed to the time when the vehicle was sold by the undersheriff, Ndola at the public auction;
- 28.3 The Learned trial Judge erred in law and in fact when he found that the Appellant's action of changing ownership of the motor vehicle amounted to unlawfully depriving the First Respondent of its property as the First Respondent had already lost ownership of motor vehicle Ssangyong Rexton 4WD SUV registration mark ALK 4829 by the time the application for change of ownership was being presented to the Appellant;
- 28.4 The Learned trial Judge erred in law and in fact when he held that ownership in the vehicle from the First Respondent to the Second Respondent only occurred when the Appellant changed the registration details from the First Respondent to the Second Respondent, despite

his finding that the Second Respondent obtained good title to the vehicle when she bought it at the auction sale.

The arguments advanced by the parties before this Court

- 29) At the hearing the Second Respondent was not in attendance. We nonetheless proceeded to hear the appeal because the dispute was between the Appellant and First Respondent.
- 30) Prior to the hearing the parties to this appeal filed heads of argument which they relied upon and which we have considered. We have not restated them in full because our decision in this appeal, as will become apparent later, is not based on these arguments as presented by the parties.
- 31) Counsel for the Appellant, Mr. A. Tembo, essentially restated the positions taken by the Appellant and the First Respondent in the Court below. In this regard, he was steadfast in denying that the Appellant was responsible for the First Respondent's loss of property in the vehicle. He took the view that the First Respondent

lost ownership of the vehicle at the point when it was seized in execution of the writ of *fieri facias*. The loss was not as a result of the steps the Appellant took in registering the vehicle.

- 32) The First Respondent's counsel, Ms G. Musyani, on the other hand, set out the purpose of the motor vehicle register which is to protect the interests of owners of motor vehicles and trailers. She also reiterated that the Appellant was obliged to comply with the provisions of Section 13 of the **Road Traffic Act** prior to effecting the change of ownership in the vehicle. That is to say, obtain the consent of the First Respondent as absolute owner. We at this stage posed several questions to counsel for the First Respondent as to whether the Court below had jurisdiction to adjudicate upon the matter in view of the fact that it was commenced by writ despite it being a challenge to the exercise of statutory functions by a public officer; was this, therefore, not an action in public law which should have been commenced by way of an application for judicial review; and, were the remedies

sought by the First Respondent in the Court below attainable in judicial review. Counsel for the First Respondent did, by and large, concede that the originating process issued in the Court below was inappropriate. She, however, declined to comment on the effect that this had on the judgment of the Court below.

Determination of the appeal by this Court.

- 33) After considering the record of appeal and heads of argument filed by the parties, we have noted that the determination of this appeal lies in the consideration of the appropriateness of the originating process filed by the First Respondent in the Court below. This question arises from the endorsement on the writ of summons. We cannot ignore the originating process although it is not the subject of this appeal because it hinges on the jurisdiction of the Court below in determining the matter which was presented before it. We have held in the past that even if the question of jurisdiction has not been raised in the Court below, we are at liberty to consider it

on appeal because of the consequences that flow from a Court acting while wanting in jurisdiction. This is the position we took in the case of ***Aristogerasimos Vangelatos and Vasiliki Vangelatos v Metro Investments Limited, King Quality Meat Products, Demetre Vangelatos and Maria Likiardo Poilou***² where we considered the jurisdictional issue despite it not having been raised in the Court below.

- 34) We will, therefore, determine whether or not the matter as presented before the Court below was properly presented and if not, what are the consequences of the judgment delivered by the Learned High Court Judge. We hasten to add that we agree with the position of the law as articulated by learned counsel for the First Respondent that in terms of the proviso to Section 13, the Appellant's officers were obliged to consult the First Respondent as the registered absolute owner of the vehicle prior to registering its transfer to the Second Respondent. The finding by Learned High Court Judge to this effect was thus on firm ground. We are also alive to

the fact that the Appellant is compelled to keep a register of motor vehicles pursuant to Section 7 of the **Road Traffic Act**. The purpose of the register is, among other things, to register securities such as the one the First Respondent had over the vehicle and to protect the interest of motor vehicle and trailer owners by notifying the public of their interest in such vehicles and trailers. Be that as it may, there is still the very important issue of jurisdiction of the Learned High Court Judge which is the determining factor in this appeal.

- 35) The record of appeal reveals that the endorsement in the originating process, which was a writ of summons and statement of claim, was for, *inter alia*; a declaration that the action by the Appellant of changing ownership in the vehicle from the First Respondent to the second Respondent were *ultra vires* the Appellant's powers as provided for in the **Road Traffic Act**; and an order compelling the Appellant to deregister the said change of ownership.

- 36) The importance of the endorsement is firstly that it reveals a relief that is sought in public law. That is to say, an allegation of *ultra vires* an enabling Act (as presented in the Court below) is a contention directed at a public body, such as the Appellant, alleging excess or unauthorized power. Consequently, the mode of commencement of such actions is judicial review pursuant to Order 53 of the ***Rules of the Supreme Court 1965 (White Book)***.
- 37) In addition, the second endorsement seeking to command or direct the Appellant to reverse the registration of the vehicle in the Second Respondent's name is akin to an order of mandamus. By definition, mandamus is an order by a superior court directing a lower court or government officer to perform his duties as enshrined in the enabling Act. Such an order can only be granted by a superior court such as the High Court if it is requested to do so through judicial review. The reason for this is that it calls for the Judge before whom such a claim is made to examine the decision making process of

the concerned public officer for purposes of determining whether or not his conduct was within the provisions of the enabling Act. The Court can only conduct such exercise through the process of judicial review.

- 38) Arising from our decision in the two preceding paragraphs, the question is, what is the consequence of the wrong originating process filed in the Court below? In the case of ***Chikuta v Chipata Rural Council***³ we held that where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the Court has no jurisdiction to make any declarations. In that case, the Appellant had sought a declaratory judgment in the Court below having commenced the action by originating summons. The position we took was that the process of originating summons is appropriate for matters which can be disposed of in chambers on affidavit evidence. In the case of a declaration, there is need for an open Court hearing to be held at which witnesses give *viva voce* evidence to enable a Judge decide whether or not the declaration

sought should be given. This can only be done if the originating process is a writ of summons.

- 39) In the case with which the Learned High Court Judge was confronted, he was required to quash the decision of the Appellant to change ownership in the vehicle if indeed it was *ultra vires* its power and issue writ of mandamus ordering it to reverse the transfer of the vehicle to the Second Respondent. These orders could not be issued via a writ of summon as they can only be done via the process under judicial review. We are thus, of the firm decision that the Learned High Court Judge had no jurisdiction to entertain that action. His judgment is consequently a nullity and we set it aside.
- 40) Our decision is by no means a statement that actions against statutory bodies or public officers can only be brought to Court via judicial review. Where a person claims a breach of statutory duty he can institute a civil action in the private law of tort for breach of statutory duty. Neil Foster, a Senior Lecturer, at Newcastle Law School, Australia writing in *The Sydney Law Review*, in

rationalizing the point we have made had the following to say on the subject:

"The tort action for Breach of Statutory Duty provides an intersection between the goals of private law and 'public' goals as determined by legislature ... But what is meant when we say that someone has a 'right' to enforce a statutory duty against another person? Clearly not every statute imposes obligations that are intended to be enforced by private individuals. Given the vast expansion of legislation emanating from parliaments in recent years, there clearly needs to be some guiding principles to determine when it is appropriate to allow a personal civil action based on breach of a statutory right. These principles have been set out for many years in the elements of the specific tort breach of statutory duty. Chapter 50 of the Second Statute of West Minister in 1285 sets out an early basis for a civil action based on statutory breach. But perhaps the modern history of the action can be traced to 'Action upon Statute(F)' in Comyn's Digest, an 18th century source for the availability of an action by an individual who suffers damage caused by the breach of a statute:

[T]hat in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantages or for the recompense of a wrong done to him contrary to the said law.

- 41) By the proviso to Section 13 of the **Road Traffic Act**, Parliament enacted a prohibition against the Appellant registering the change of ownership in a motor vehicle without it first consulting the absolute owner of the motor vehicle. Notwithstanding this provision, the Appellant went ahead and changed ownership of the vehicle into the name of the Second Respondent without consulting the First Respondent. This action did not please the First Respondent prompting it to take out an action.
- 42) In light of the authority we have set out in paragraph 40, it is clear that the facts of this case show that the First Respondent had a cause of action in the private civil remedy of tort for breach of statutory duty. It was therefore, open to it to institute proceedings through that avenue. In doing so, it should have endorsed the claim on the writ as being for "*damages for breach of statutory duty owed to it by the Appellant to consult before registering the change of ownership in the motor vehicle pursuant to Section 13 of **The Road Traffic Act***" or "A

*declaration that the Appellant breached the statutory duty imposed upon it by Section 13 of **The Road Traffic Act** to consult it prior to changing ownership in the vehicle and as such the change of ownership of the vehicle to the Second Respondent is null and void ab initio". This is but to give just two examples of the possible endorsements the Appellant could have made.*

- 43) In the course of delivery of this judgment, we have repeatedly referred to the claim as endorsed on the originating process in the Court below as the determining factor. This is not to say that our decision in the **Chikuta**³ case is bad law in as far as it states that what determines the mode of commencement of an action is the enabling statute and not the claim or endorsement. The situation with which we are confronted is a unique one in that judicial review in Zambia cannot point to local legislation for parentage. It is a relief which is anchored solely on Order 53 of the **White Book** which must be strictly adhered to as we have held on numerous occasions. Because there is no local legislation which prescribes the mode of commencement for judicial review, we are left with no choice but to look at the claim and relief sought in the Court below to determine the

appropriateness or otherwise of the process issued and proceedings.

Conclusion

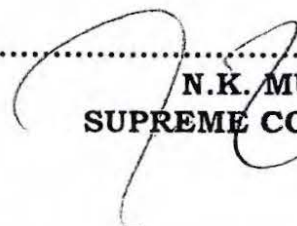
- 44) To the extent that we have found the Learned High Court Judge wanting in jurisdiction, the appeal must succeed. We accordingly allow it and set aside the judgment of the Learned High Court Judge. Further, since the judgment of the Learned High Court Judge has been set aside, the First Respondent will have lost one of the securities for the loan facility extended to BMGDL. However, the First Respondent still retains the right to pursue other assets of BMGDL.
- 45) As regards costs, the circumstances of this case are such that we are compelled to order that the parties bear their respective costs and we so order.



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I.C. MAMBILIMA
CHIEF JUSTICE



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M. MALILA
SUPREME COURT JUDGE



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N.K. MUTUNA
SUPREME COURT JUDGE