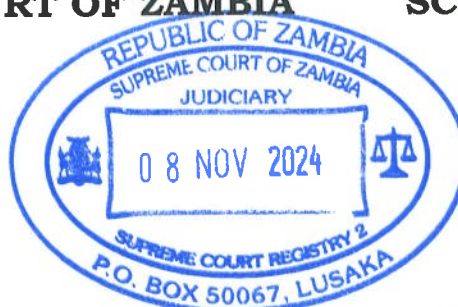


**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

SCZ/8/41/2023



BETWEEN

FINSBURY INVESTMENTS LIMITED

APPLICANT

AND

EASTERN AND SOUTHERN AFRICAN

TRADE AND DEVELOPMENT BANK

RESPONDENT

Before the Hon. Mr. Justice Nigel K. Mutuna on 8th day of November 2024

For the Applicant:

Mr. D. M. Chakoloka, of Messrs Mulenga Mundashi Legal Practitioners and Mr. N. Chibeleka and Mr. D. Silavwe of Messrs RASO Chambers

For the Respondent:

Mr. C. J. Mumba of Messrs Chibesakunda and Company Advocates

R U L I N G

Cases referred to:

1. **Bidvest Food Zambia Limited & 4 Others v CAA Import and Export Limited SCZ Appeal No. 56 of 2017**
2. **Kekelwa Samuel Kongwa v Meamui Geaorgina Kongwa SCZ/8/05/2019**
3. **Zlatan Zlatkoanautovic v Stanbic Bank Zambia Limited SCZ/08/14/2020**
4. **Attorney-General v Chishimba Kambili SCZ/8/15/2020**

Legislation referred to:

- 1) **Supreme Court Act, Cap 25**

Introduction

- 1) This is the applicant's motion for permission to appeal to the Supreme Court against a judgment of the Court of Appeal dated 30th May 2023. It is presented by way of summons pursuant to **Section 24(b)** of the **Supreme Court Act** as read with **Rule 48** of the **Supreme Court Rules**.
- 2) The grounds, in so far as the same are relevant to this motion, pursuant to which this motion is made are as follows:
 - 2.1) the intended appeal raises points of law of public important; and
 - 2.2) the intended appeal has reasonable prospects of success.
- 3) The motion before me is by way of renewal of a similar motion for permission to appeal which was before the Court of Appeal. In the motion before that court, the Court of Appeal dismissed the applicant's application for permission to appeal against its judgment dated 30th May 2023.
- 4) The applicant now presents its motion before me seeking permission to appeal. In doing so, it has filed an affidavit in support which sets out detailed facts surrounding the matters which were before the High Court and Court of Appeal. I

summarise these facts later in this motion.

- 5) The applicant has also filed a list of authorities and skeleton arguments in support of the motion. In response, the respondent has filed an affidavit in opposition and skeleton arguments.

The motion

- 6) The first ground raised by the applicant in support of the motion is that, the intended appeal raises points of law of public importance. These points, as endorsed on the summons, are as follows:

- 6.1) Whether the High Court has jurisdiction to hear an application for extension of time within which to lodge an appeal that has been dismissed by the Court of Appeal; and,

- 6.2) Whether an appeal dismissed for breach of a regulatory rule can be resuscitated by way of restarting the appeal process before the High Court.

These questions, arise from the grounds of the intended appeal which appear in the memorandum of appeal which is at page 110 of the affidavit in support.

- 7) The evidence in support of the motion was led by Sakwanin

Peter Chilembo, in-house counsel in the applicant. He stated, in relation to the first ground, that on 5th March, 2019, the applicant commenced proceedings before the High Court against the respondent under cause number 2019/HP/0288. It claimed damages for conspiracy, damages for interference, interest, costs and any other relief the court would deem fit.

- 8) Later the respondent filed a defence which it subsequently amended. It then applied to the High Court on 11th November 2019, seeking a determination of various issues, one of which was whether the action commenced by the applicant was statute barred. The applicant opposed the application and the High Court rendered its ruling on 26th May, 2020 dismissing the respondent's application. The High Court also granted the parties a further 45 days within which to comply with the order for directions and set the matters down for trial on 20th and 30th September 2020. It also granted the respondent permission to appeal within 30 days.
- 9) Subsequently, on 26th June 2020, which was a period in excess of the 30 days granted by High Court to appeal, the respondent filed a notice and memorandum of appeal against the High Court decision of 26th May 2020, (the "first High

Court Ruling”). This prompted the applicant to file an application to the Court of Appeal, on 11th September 2020, to dismiss the appeal filed by the respondent on 26th June 2020 (“the first appeal”) on the ground that it was irregular for being filed out of time.

- 10) The respondent’s response came by way of an application to the Court of Appeal for extension of time within which to appeal against the first High Court Ruling. This was filed on 23rd October, 2020. It also filed its opposition to the applicant’s motion to dismiss the appeal for irregularity.
- 11) On 6th August 2021, a single judge of the Court of Appeal dismissed the first appeal for irregularity. The judge went on to state that the first appeal having been irregularly filed by the respondent in the Court of Appeal, (for want of permission of the High Court to file it out of time) could not be cured by an application for extension of time before the Court of Appeal.
- 12) This prompted the respondent to go back to the High Court and apply for an extension of time within which to file a notice and memorandum of appeal against the first High Court Ruling. The applicant responded by way of a motion to set aside the respondent’s application for extension of time, on the

ground that the High Court lacked jurisdiction to entertain such an application.

- 13) On 12th February, 2022 the High Court dismissed the respondent's application for extension of time and granted it permission to appeal its ruling, (the second High Court Ruling).
- 14) Pursuant to the said permission, the respondent filed a notice and memorandum of appeal in the Court of Appeal on 10th March 2022 against the second High Court Ruling. The appeal was subsequently set down for hearing after the parties filed their respective documents in support and opposition.
- 15) On 30th May 2023, the Court of Appeal delivered a judgment in which it allowed the respondent's appeal and held that High Court erred in holding that it had no jurisdiction to grant an extension of time on the ground that the first appeal had been dismissed by a single judge of that court. It further directed the High Court judge to re-hear and determine the application for extension of time on the merits.
- 16) In the skeleton arguments and *viva voce* arguments, counsel for the applicant began by defining what constitutes a point of law of public importance and the threshold that a party should

surmount. Reference in this regard was made to the case of **Bidvest Food Zambia Limited & 4 Others v CAA Import and Export Limited**¹. They went on to argue that for an intended appeal to satisfy the test, it must raise a legal question with a public or general character rather than one that merely affects private rights or interests of the parties to the dispute. This, it was contended, is in line with the decision in the case of **Kekelwa Samuel Kongwa v Meamui Georgina Kongwa**².

- 17) Applying the foregoing test in these authorities to the motion, counsel began by quoting a passage from the judgment of the Court of Appeal and concluded that by the said decision, the court suggested that the High Court did not lose jurisdiction to extent time within which to file on appeal once such appeal had been dismissed by the Court of Appeal. Counsel contended that a plethora of authorities revealed a contrary position and that this is the issue which raises a point of law of public importance. Counsel went to great length at justifying the position taken by the applicant as regards the fate of an appeal which has been dismissed but I have not summarized this portion of the argument as it is reserved for the main appeal if and when permission to appeal is granted.

- 18) The evidence opposing the motion was sworn by one Edward Sampa, an officer of the respondent. In so far as it related to the applicant's ground that the intended appeal raises points of law of public importance, the deponent stated that the applicant had not demonstrated how this is so. He went on to state that the intended appeal had been overtaken by events and would thus just be a moot point if permission to appeal is granted. According to the deponent, the High Court had determined the application for extension of time as directed by the Court of Appeal on 23rd January, 2024 and allowed the application.
- 19) The witness went on to say that after the extension of time was granted the respondent had gone ahead and filed the notice and memorandum of appeal.
- 20) In the arguments in support of the motion as it relates to the ground that the intended appeal raises a point of law of public importance, counsel for the respondent argued that the applicant had not surmounted the threshold test. They went on to argue that the affidavit evidence had revealed this application has been rendered moot by virtue of the ruling delivered by the High Court on 23rd January 2024 and the

subsequent filing of the notice and memorandum of appeal by the respondent.

- 21) Counsel argued that there is no point of law of public importance raised by the intended appeal because the judgment of the Court of Appeal sought to be challenged had explained the effect of the decision of the single judge of that court which dismissed the respondent's application for an extension of time within which to file the notice and memorandum of appeal.
- 22) Coming to the second ground that the appeal has reasonable prospects of success, the evidence led by both parties was a repetition of that raised in the first ground of point of law of public importance. I have, therefore, not repeated it in summarizing the motion under the second ground.
- 23) The thrust of the argument by counsel for the applicant under this ground was an attack on the decision of the Court of Appeal which they contended overlooked the fact that once the single judge of the Court of Appeal dismissed the appeal, the High Court Judge was rob of any jurisdiction to entertain an application relating to such appeal. For that reason, according to counsel, the intended appeal has reasonable prospects of

success.

24) Counsel advanced their argument by submitting that their position was reinforced by the fact that the respondent has not challenged the decision of the single judge dismissing the appeal. Concluding arguments on this issue, counsel drew my attention to the decision in the case of **Zlatan Zlatkoanautovic v Stanbic Bank Zambia Limited**³ where a single judge of this court held that a jurisdictional issue mounted by the applicant constituted a point of law of public importance and met the threshold set by **Section 13(3)** of the **Court of Appeal Act**.

25) I was urged to allow the motion.

26) In the arguments in response, counsel for the respondent argued as follows:

26.1) The determination of the intended appeal would be moot as the action it seeks to prevent has already been achieved. To this end, counsel contended that the judgment of the Court of Appeal of 30th May 2023 has already been put into effect.

26.2) Counsel drew my attention to the decision of **Attorney-General v Chishimba Kambwili**⁴ in which the Supreme

Court held that a court should not exercise its discretion in a matter that has been rendered moot. I was urged to dismiss the motion.

Consideration and Decision

27) My decision in this motion follows the consideration of the documents filed in support and opposition by the two parties. In ground 1, the applicant's contention is that the intended appeal raises points of law of public importance. The respondent's position is to the contrary and that the applicant has not surmounted the threshold.

28) In the background section of this ruling, I have set out the facts leading up to and prompting this motion. In summary, they reveal a decision by a single judge of the Court of Appeal dismissing an appeal and later the full court of the Court of Appeal directing the High Court to hear an application for extension of time of that very dismissed appeal.

29) The applicant has thus raised the question: does the High Court have jurisdiction to extend time within which to lodge an appeal that has been dismissed? Arising from this question the applicant raises a subsequent question of whether an appeal that has been dismissed can be resuscitated by way of

restarting the appeal process in the High Court.

30) I have gone to great length to summarise the background because it is crucial in answering the question whether the intended appeal raises points of law of public importance. This is the test which has been aptly set out in the **Bidvest**¹ judgment referred to by counsel for both parties.

31) In answering the question, I have asked myself the question, what is the effect of the decision of the Court of Appeal which effectively re-opens a dismissed appeal. The answer is that it will expose the parties to further litigation which is costly such that if the intended appeal is found to be meritorious if permission to appeal is allowed could have been avoided.

32) The other question I have asked myself is, does this decision of the Court of Appeal sought to be assailed only affect and will end at the two parties before me. I think not because the Court of Appeal will have set a precedent which it will replicate to the detriment of the two parties before me and the public at large (which will resort to it in future) if not stopped if permission to appeal is granted and the intended appeal is allowed.

33) To this end, I am of the firm view that the intended appeal raises points of law, as crafted by the applicant in the motion,

of public importance that transcend the parties before me and affect the public at large.

34) What about the prospects of success? The applicant has gone to great length to argue the alleged misdirection committed by the Court of Appeal in its judgment of 30th May 2023. It is not my place to delve into these arguments in detail. The respondent's position is that allowing the intended appeal to proceed is akin to allowing the applicant to shut the barn door after the house was bolted. The intention it seeks to stop has already been effected.

35) I have made a cursory examination of the matter before me to determine whether the intended appeal has prospects of success and asked the questions:

35.1) What is the effect of a dismissed appeal?

35.2) What is the effect of the decision of a single judge of the Court of Appeal dismissing an appeal which has not been challenged? and,

35.3) Can a party revive a dismissed appeal by reverting back to the High Court and seeking to repair an omission?

The answers to the foregoing question are quite obvious and

reveal, not reasonable, but realistic prospects of success of the intended appeal.

36) I have heard the respondent when it argued that the intended appeal is academic because the decision of the Court of Appeal of 30th May, 2023 sought to be assailed has been effected by the High Court judge hearing and granting the application for extension of time. This may be so, but I am still of the firm view that allowing the intended appeal will serve a useful purpose for the following reasons:

36.1) If the intended appeal is allowed it will curtail the practice adopted by the Court of Appeal which I have referred to in paragraph 32 hereof, and,

36.2) There is every chance that the appeal to the Supreme Court may be heard before the appeal in the Court of Appeal. This would then mean that it would be the appeal in the Court of Appeal which would be rendered nugatory.

37) For the reasons I have stated in the preceding paragraphs, I find merit in the application as the applicant has proved the two grounds advance. By way of obiter and as a way of addressing the concerns raised in paragraph 36, this would be

an appropriate case in which the parties would agree to stay proceedings in the Court of Appeal pending the decision of this appeal as it will have an impact on the decision of the Court of Appeal. As officers of the court, compelled to ensure the administration of justice, counsel are urged to advise their clients accordingly.

Conclusion

38) I accordingly grant the applicant permission to appeal. In doing so, I direct it to file the notice and memorandum of appeal within 30 days of the date hereof. The applicant will have the costs of this application.

Dated at Lusaka this 24 **day of** NOV. 2024


Nigel K. Mutuna
SUPREME COURT JUDGE