

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2011/HPC/0201**

**BETWEEN:**

<b>BASCOM ENTERPRISES LIMITED</b>	<b>1<sup>st</sup></b>	<b>PLAINTIFF</b>
<b>GILLIAN CASILLI</b>	<b>2<sup>nd</sup></b>	
<b>PLAINTIFF</b>		
<b>DIEGO CASIL</b>	<b>3<sup>rd</sup></b>	<b>PLAINTIFF</b>
<b>RICHARD ANTONY HADLEY</b>	<b>4<sup>th</sup></b>	<b>PLAINTIFF</b>

**AND**

<b>BHARTI AIRTEL ZAMBIA HOLDINGS BV</b>	<b>1<sup>st</sup></b>	
<b>DEFENDANT</b>		
<b>CELTEL ZAMBIA PLC</b>	<b>2<sup>nd</sup></b>	<b>DEFENDANT</b>
<b>SECURITIES AND EXCHANGE COMMISSION</b>	<b>3<sup>rd</sup></b>	<b>DEFENDANT</b>

**BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 26<sup>th</sup> DAY OF MARCH, 2012**

For the Plaintiffs	:	Mr. P. G. Katupisha of Milner Katolo & Associates
For the First and Second Defendants	:	Mr. E. Silwamba SC & Mr. J. Jalasi
For the 3 <sup>rd</sup> Defendant	:	Mr. C. Hara Legal Counsel

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## **RULING**

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Cases referred to:

1. **Payne -VS- British Time Recorder Company (1921) 2 K.B. page 16.**
2. **Horwood -VS- British Statesman Publishing Company Ltd (1929) W.N. 38.**
3. **Daws -VS- Daily Sketch and Sunday Graphic Limited & another (1960) 1 ALL E.R. page 397 CA.**
4. **Pan Electronic Limited and Savvas Panayiotides and others - VS- Andreas Miltiadous and others (1988 - 1989) ZR.**
5. **The Attorney General -VS- Aboubacar Tall & Zambia Airways Corporation Limited SCZ No. 77 of 1994.**
6. **Sentor Motors Limited & 3 others SCZ No. 9 of 1996.**
7. **Development Bank of Zambia & KPMG Peat Marwick -VS- Sunvest Limited & Sun Pharmaceuticals Limited SCZ No. 3 of 1997.**
8. **BP Zambia Plc -VS- Interland Motors Limited SCZ No. 5 of 2001.**
9. **Mukumbuta & others -VS- Mongu Meat Corporation Limited SCZ No. 8 of 2003.**
10. **Lewis -VS- Daily Telegraph (No.2) [1964] 2QB 601**
11. **Hilde Marchant -VS- Ford, Peter Davies Ltd, The Guernsey Star & Gazette Company Ltd and McLegan & Cumming (sued as a Firm) Walter Marchant -VS- Same (1936) 3 ALL ER 104**

Other authorities referred to:

1. **High Court Act Chapter 27 of the Laws of Zambia.**
2. **Supreme Court Practice, 1999 volume 1.**

The delay in delivery of this ruling is regretted.

This is an application by the First and Second Defendants to consolidate this action to the action under cause number 2011/HPC/380. The application is made by way of summons and supporting affidavit filed on 27<sup>th</sup> October, 2011 pursuant to Order III(5) of the **High Court Rules** of the **High Court Act** as read with Orders 4 rule 9 and 15 of the **Supreme Court Practice**

**1999 (whitebook).** In support of the application, the First and Second Defendants also filed skeleton arguments on 28<sup>th</sup> October, 2011.

By the said application the First and Second Defendants seek to consolidate the two actions on the grounds that; the causes of actions in the two actions arise out of the same or series of transactions; and there are common questions of law and fact to be determined in the two actions.

The Plaintiff's response was by way of an affidavit in opposition and skeleton arguments filed on 11<sup>th</sup> November, 2011 and 28<sup>th</sup> November, 2011 respectively.

The affidavit in support was sworn by one Eric Suwilanji Silwamba SC and it began by confirming the existence of the two actions and parties under cause numbers 2011/HPC/0201 and 2011/HPC/380. It went on to reveal the reliefs sought in the two actions. Further that, the relief sought by the Plaintiff's under cause number 2011/HPC/380 derives and arises from the same transaction as the matter that is currently before this Court. As such the ends of justice would best be served if this matter is consolidated with the matter under cause number 2011/HPC/380.

The affidavit in opposition was sworn by one Priscilla Chikuni Sampa. In opposing the application, the deponent stated that the circumstances giving rise to the causes of action in the two actions are different. In the case before this Court the relief sought by the Plaintiffs is in respect of the acquisition of the Plaintiffs' shares in Celtel Zambia Plc. On the other hand in the action under cause number 2011/HPC/380, the Plaintiff seeks trade commission involving the acquisition from ZAIN International BV of the 78.9% shares in Celtel Zambia Plc. These two reliefs are therefore radically different. Further, there is no multiplicity of actions as a result of that and the parties involved are different save for Bharti Airtel Zambia Holding BV.

The consolidation of the two actions would therefore prejudice or delay the expeditions disposal of the two actions.

The matter came up for hearing on 1<sup>st</sup> December, 2011. Counsel for the First and Second Defendants Mr. E. S. Silwamba SC and Mr. J. Jalasi began by restating the fact that there are two matter before this Court under cause number 2011/HPC/201 and cause number 2011/HPC/380 presided over by Kajimanga, J. Further that the two Defendants sought the actions to be consolidated on the basis that; some common question of law or fact has arisen in both matters; and the rights to relief claimed in the matter under cause number 2011/HPC/380 arises out of the same transaction as that involving this matter. In articulating the said argument reference was made to Order III (5) and section 13 of the **High Court Act** and Orders 4 rule 9 of the **whitebook**.

Counsel proceeded to advance arguments on the two grounds upon which the consolidation was sought. As regards the first ground of common question of law or fact, it was argued that this action arises out of the transaction by Bharti Airtel Zambia Holding BV to acquire Zain International BV. An examination of the reliefs sought in the two actions indicated that the actions arise not only out of the same facts but same transaction namely, the acquisition of Celtel Zambia Plc trading as Zain Zambia by the Second, Third and Fourth Defendants. It was therefore disrable to consolidate the matters for purposes of avoiding multiplicity of actions and in the interests of having the matters in dispute disposed of at once. Counsel proceeded to list and quote from a number of decisions in support of this position as follows; **Payne -VS- British Time Recorder Company (1), Horwood -VS- British Statesman Publishing Company Ltd (2), Daws -VS- Daily Sketech and Sunday Graphic Limited and another (3), Pan Electronic Limited and Savvas Panayiotides and others -VS- Andreas Miltiadous and others (4), The Attorney General -VS- Aboubacar Tall**

**& Zambia Airways Corporation Limited (5), Sentor Motors Limited & 3 others (6), Development Bank of Zambia & KPMG Peat Marwick -VS- Sunvest Limited & Sun Pharmaceuticals Limited (7), BP Zambia Plc -VS- Interland Motors Limited (8), Mukumbuta & others -VS- Mongu Meat Corporation Limited (9).**

As regards the second ground of the reliefs claimed being in respect of or arising out of the same or series of transactions, counsel began by drawing my attention to an action that was before my sister Chishimba J., being **Chanda Mutoni & 7 others -VS- Bharti Airtel Zambia Holdings BV & Celtel Zambia 2011/HPC/0134**. It was argued that the said action arose out of the same transaction as in this matter and that execution of judgment in that action had been stayed pending the determination of the appeal before the Supreme Court. This fact makes the consolidation attractive so that a stay of this action can be sought pending the outcome of the appeal before the Supreme Court. In articulating the foregoing argument, counsel drew my attention to another matter before the High Court at Kitwe whose subject matter he argued is substantially the same and arises out of the same transaction and raises the same question of law. The said case is **Mohan Chugani -VS- Bharti Airtel Zambia Holdings BV 2011/HK/144** and it is before my brother Chali, J. As regards the fact that there are a number of lawyers representing the Plaintiff in the actions which militates against consolidation, counsel argued that the Court can grant an order for consolidation even in such a situation where special circumstances exist. In concluding their submissions counsel argued in the alternative that should the Court feel disinclined to consolidate the actions it must order that the actions be heard one after the other. In doing so one of the actions should be stayed.

In response to the First and Second Defendants' arguments, Mr. P.G. Katupisha began by restating the inherent jurisdiction of the Court to order

consolidation of matters pursuant to Order III rule 5 of the **High Court Act** and Order 4 rule 9 of the **whitebook**. He went on to oppose the application on three grounds. The first was that in view of the fact that the Plaintiffs in the two cases have instructed different advocates the consolidation would be impossible. This is so because there is no evidence before Court to demonstrate that the Plaintiffs have agreed that one firm of advocates will act for them in the event that the matters are consolidated. My attention in this respect was drawn to Order 4 rule 9 (2) of the **whitebook** and the case of **Lewis -VS- Daily Telegraph (No. 2) (10)**.

The second ground was that the causes of action in the two actions do not arise from the same transaction or series of transactions. It was argued that the transaction under cause number 2011/HPC/0201 arose out of failure by the Defendants to follow procedure in acquiring shares from the minority share holders. On the other hand, the action under cause number 2011/HPC/380 arises from an alleged failure to perform a statutory duty to pay commission following the sale of shares in Celtel Zambia. The two actions cannot therefore be consolidated in line with the principle in the case of **Daws -VS- Daily Sketech & Sunday Graphic Limited and another (3)**.

The last ground advanced alleged that it is practically impossible to determine the two actions at once because it would result in embarrassment to some of the parties. This is on account of the fact that some of the parties may be required to wait for the determination of one matter while their matter was stayed. In articulating the said argument counsel made reference to the case of **Hilda Merchant -VS- Ford, Peter Davies Limited, The Guernsey Star & Gazette Company Ltd and McLegan & Cumming (Sued as a Firm); Walter Merchant -VS- Same (11)**.

I have considered the affidavit evidence and arguments by counsel for the parties. This application as I have stated in the earlier part of this ruling is for consolidation of this action with the action under cause number 2011/HPC/380. The grounds upon which the consolidation is sought are that; the reliefs sought by the Plaintiffs in the two actions arise from the same transaction or series of transactions; and a common question of law or fact has arisen in the actions.

The application is anchored on Order III (5) of the **High Court Act** as read with Order 4 rule 9 of the **whitebook**. The former order states as follows;

***“Cases or matters pending in the Court may, by order of the Court or a Judge, be consolidated and the Court or a Judge shall give any directions that may be necessary as to the conduct of the consolidated actions.”***

On the other hand the latter states as follows;

***“(1) Where two or more causes or matters are pending in the same Division and it appears to the Court -***

***(a) that some common question of law or fact arises in both or all of them, or***

***(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or***

***(c) that for some other reason it is desirable to make an order under this paragraph***

***the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.***

***(2) Where the Court makes an order under paragraph (1) that two or more causes or matters are to be tried at the***

***same time but no order is made for those causes or matters to be consolidated, then, a party to one of those causes or matters may be treated as if he were a party to any other of those causes or matters for the purpose of making an order for costs against him or in his favour.”***

It is clear from the foregoing orders that this Court does have jurisdiction to order the consolidation of actions as long as the requirements set out by Order 4 rule 9 of the **whitebook** are met. As such, this application is therefore properly before me except that I have to determine whether or not it has satisfied the test laid down in Order 4 rule 9 of the **whitebook** to enable me grant the order as prayed. I intend determining this issue by examining the claims as endorsed in the writs of summons and facts of the two cases as highlighted in the statements of claim. Following such examination I will be in a position to determine whether the actions arise from the same or series of transactions and or if there are common questions of law and fact in the two actions.

The claim as endorsed on the writ in this matter is for the following relief;

1. *An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to disclose the value paid by the 1<sup>st</sup> Defendant for the acquisition of 78.9% shares in the 2<sup>nd</sup> Defendant.*
2. *An Order for the recalculation of the fair market value per share of all the 2<sup>nd</sup> Defendant shares as of 8<sup>th</sup> June 2010.*
3. *An Order for payment to the Plaintiffs of the Difference of the value found in (2) above and the K710.00 already paid to the Plaintiffs.*
4. *Damages against the 3<sup>rd</sup> Defendant for breach of its Statutory Duty to the Plaintiffs.*



5. *Any other relief the Court may deem fit.*
6. *Interest*
7. *Cost”*

The relevant facts revealed in the statement of claim as they relate to the transaction from which the claim arises are that on 8<sup>th</sup> June, 2010, the First Defendant acquired approximately 78.9 shares in the Second Defendant. Subsequent to the said acquisition and on 22<sup>nd</sup> November, 2010, the First Defendant issued a circular to the Plaintiffs and other shareholders making a mandatory offer to acquire 1,097,778,000 shares representing 21.11% shares in the Second Defendant at a price of K710.00 per share. The said offer price was arrived at by the First Defendant unilaterally.

On the other hand, the claim in the action under cause number 2011/HPC/380 is for the following relief;

- “(i) The sum of K1,000,000,000.00 from the First Defendant being the market trade commission on the transaction involving the sale to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the Plaintiff’s stock exchange market the 78.9% shares in Celtel Zambia Plc a public company listed on the Plaintiff stock exchange.*
- (ii) The sum of K1,000,000,000.00 from collectively the 2<sup>nd</sup> Defendant, 3<sup>rd</sup> Defendant and 4<sup>th</sup> Defendant being the market trade commission on the transaction involving the acquisition from the 1<sup>st</sup> Defendant of 78.9% shares in Celtel Zambia Plc a public company listed on the Plaintiff’s stock exchange ...”*

The facts as they are revealed by the statement of claim are that on or about 8<sup>th</sup> June 2010 Bharti Airtel International (Netherlands) BV, through its wholly owned African subsidiary Bharti Airtel Africa BV, concluded the acquisition of 100% of the issued share capital and voting rights of Zain International BV. This was from Mobile Telecommunications Company KSC, a company listed

on the Kuwait Stock Exchange, and pursuant to a share sale agreement dated 30<sup>th</sup> March, 2010. As a result of this, Bharti Airtel Africa BV became a wholly owned subsidiary of Bharti Airtel International (Netherlands) BV which holds 100% shareholding in Bharti Airtel Zambia Holding BV. The said Bharti Airtel Zambia Holding held 78.89% listed shares in Celtel Zambia Plc and as such the transaction resulted in Bharti Airtel International (Netherlands) BV acquiring and becoming the beneficial owner of the 78.89% shares and voting rights in Celtel Zambia Plc. This acquisition in terms of the **Securities Act** and subsidiary legislation thereof amounts to dealing in the aforesaid shares on the Lusaka Stock Exchange Limited (the Plaintiff). The said Lusaka Stock Exchange Limited is therefore entitled to a market trade commission on the transaction, payable by the seller and buyer, at the rate of 0.25% of the total declared value of the 78.9% share in Celtel Zambia Plc.

Having stated the reliefs claimed and facts surrounding the claims I will now proceed to determine firstly whether a common question of law and fact arises in the two actions and secondly whether the causes of actions arise from the same transaction or series of transactions.

As regards the first issue of common question of law and fact, I find that the questions of law and fact that arise in the two actions are not the same but distinct. In this action the Plaintiffs seek an order to compel the First and Second Defendants to disclose the value paid in the acquisition of 78.9% shares in the Second Defendant. It also requires payment to the Plaintiff of the differences in values and damages. The action is a claim by shareholders against a company they own shares in, its purchaser and market regulator for disclosure of certain information. Therefore, the question that I shall be called upon in this action to determine is whether or not the Plaintiffs are entitled to such disclosure. This is quite distinct from the question to be determined in the action under cause number 2011/HPC/380

which is for the determination of whether or not a stock exchange which provided a forum for purchase and sell of shares is entitled to commission.

I therefore find no merit in this application as it relates to the question whether or not the actions arise from common questions of law and fact.

I now turn to the question whether or not the rights to relief claimed in the actions arise from or are in respect of the same transaction or series of transactions. As a starting point I acknowledge the fact that both this action and the one under cause number 2011/HPC/380 have a common parentage because they both trace their genesis from the sell of the 78.9% shareholding and voting rights in Celtel Zambia Plc. The matter however, does not end there as it relates to the action under cause number 2011/HPC/380. The shareholding in issue and voting rights attached thereto were allegedly traded on the Lusaka Stock Exchange, a market owned and regulated by the Plaintiff in that action, Lusaka Stock Exchange Limited. The Plaintiff under that cause claims commission for the use of its market for the sell of the shares, which, in my considered view, is a separate and distinct transaction all together. For purposes of clarifying the foregoing, my finding is that the action in this case arises from the transaction for the sell of the shares in Celtel Zambia Plc, while the action under cause number 2011/HPC/380 arises from the subsequent transaction involving the use of the stock market owned by the Plaintiff, Lusaka Stock Exchange Limited for trading of shares by a buyer. These transaction can not therefore be said to be one and the same transaction nor are they a series of the same transaction and for this reason the application fails on this ground as well.

The ill fate of the application is compounded by the fact that the Plaintiffs in the two actions are represented by different advocates. The said Plaintiffs have also not indicated that one firm of advocates shall act on their behalf following the consolidation. This being the case and in line with the

provisions of Order 4 rule 9 subrule 2 of the **whitebook** which militates against consolidating in such circumstances, it is impossible to order consolidation. The order states in part as follow;

***“Moreover, as one firm of solicitors will usually be given the conduct of the consolidated action on behalf of all Plaintiffs, it is generally impossible to consolidate actions in which different solicitors have been instructed, unless all Plaintiffs agree that one firm of solicitors shall act on their behalf.”***

The Plaintiffs’ advocates in this action are Messrs Milner Katolo Associates, who are distinct from the Plaintiff’s advocates in the action under cause number 2011/HPC/0380 being, Messrs Lewis Nathan Advocates. Further, the affidavit evidence does not indicate that the Plaintiffs in the two actions will all use one firm of advocates following the consolidation. There can therefore be no consolidation given this situation.

In arriving at the finding I have made in the preceding paragraph, I have considered the argument by counsel for the First and Second Defendants that where special circumstances exist two actions may be consolidated even where the Plaintiffs’ advocates are different. This argument is tenable only where there is partial consolidation as prescribed under Order 4 rule 9 subrule 2 of the **whitebook** which states as follows;

***“So, for example, where there are several actions by different solicitors, in which damages are claimed for personal injuries occasioned in the same accident, it may be possible to consolidate the actions up to the point of where the issue as to liability is decided giving the conduct of the action up to that point to one Plaintiff’s solicitor, and leaving the actions separate upon the issue as to quantum of damages.”***

The circumstances in the two actions under consideration do not merit such treatment and neither have the First and Second Defendants, in making this application, sought an order for partial consolidation.

I have also considered the authorities cited by counsel for the First and Second Defendant on consolidation of actions in articulating arguments in support of the application. I endorse the principles contained in the authorities but the same are not applicable to this case in view of my finding that it is not suitable for consolidation. Further, I have considered the arguments advanced by counsel for the Defendants in relation to the actions before my sister Chishimba J and brother Chali J. The arguments sought to persuade this Court to grant the order sought because those cases before my sister and brother are also allegedly similar to this action and the one under cause number 2011/HPC/0380. Rather than persuade me, counsel left me totally at sea as to the relevance of the reference to those two actions because this application does not seek to have them consolidated as well. The arguments are also not representative of the principles for consolidation because consolidation can not be sought for purposes of staying an action pending determination of an appeal.

By way of conclusion, having found that the application lacks merit, I accordingly dismiss it with costs. I further direct that the matter come up for a Scheduling Conference on 18<sup>th</sup> day of April 2012 at 08:50 hours.

Leave to appeal is granted.

**Delivered on the 26<sup>th</sup> day of March, 2012.**

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Nigel K. Mutuna  
**HIGH COURT JUDGE**