

IN THE HIGH COURT FOR ZAMBIA
2012/HPA/002
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

BAKEWELL BAKERIES LIMITED

Appellant

and

STEYN JEMPA

Respondent

Before the Hon. Lady Justice F. M. Lengalenga this 5th day of October, 2012 in chambers at Lusaka

For the appellant : Mr. C. L. Mundia, SC - Messrs C. L. Mundia and Company

For the respondent : Mr. H. H. Ndhlovu, SC - Messrs H. H. Ndhlovu & Company

J U D G M E N T

Cases cited:

- 1. DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK v SUNVEST LIMITED AND SUN PHARMACEUTICALS LIMITED (1995/97) ZR 187 (SC)**
- 2. BP ZAMBIA PLC v INTERLAND MOTORS LIMITED - SCZ JUDGMENT № 5 OF 2001**

This is the appellant's appeal against the Hon. Magistrate's part of the

ruling that there was no multiplicity of actions on the following ground:

“That the Hon. Magistrate erred in law and in fact when she held that there was no multiplicity of action when the law provides otherwise.”

The appeal is supported by heads of arguments filed into court on 19th March, 2012 and the appellant’s reply filed into court on 14th May, 2012. In the said arguments, Counsel for the appellant quoted a part of the ruling made by the court below and of relevance to this appeal is the part where the Hon. Magistrate stated that:

“No facts were determined by the court hence there is no multiplicity of actions.”

Counsel for the appellant, Mrs. Tresha disagreed with the judgment of the court below and contended that there was a typical case of multiplicity of actions in terms of the Supreme Court’s decision in the case of **DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK v SUNVEST LIMITED AND SUN PHARMACEUTICALS LIMITED**¹ and which multiplicity of procedures and proceedings or actions over the same subject matter is frowned upon by the Court. She also relied on the case of **BP ZAMBIA PLC v INTERLAND MOTORS LIMITED**² and

submitted that the respondent has dragged the appellant before two courts over the same subject matter and that the respondent is still at liberty to go back to the court below and revisit his dismissed matter before Hon. Walusiku. She submitted further that the possibility of having two conflicting decisions over the same matter would be there if the second matter is allowed to proceed. She further submitted that allowing the respondent to continue commencing fresh actions when one matter is dismissed would definitely be leaving behind doors that could be reopened by way of appeal or review for litigation over the same subject. Counsel for the appellant prayed that the court holds that by commencing a fresh action there was multiplicity of actions on the part of the respondent and an abuse of court process and order that the fresh action be quashed as was done in the **DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK** case.

The respondent's submissions were filed into court on 25th April, 2012 by Counsel for the respondent, Mr. H. H. Ndhlovu, SC. In the said submissions, he submitted that the learned trial magistrate was on firm ground when he found that there was no multiplicity of actions in this case as cause number 2009/CRMP/1040 was never tried and is no longer on the active cause list and that as such commencing cause 2010/CRMP/514 would not create any multiplicity of actions. He submitted further that the **DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT**

MARWICK case was cited and referred to out of context because in that case, there was another active cause. Learned State Counsel further submitted that no decision was made in cause number 2009/CRMP/1040 which could affect the decision that would be made in cause number 2010/CRMP/514 and he also added that even the case of **BP ZAMBIA PLC v INTERLAND MOTORS LIMITED** was also referred to out of context as in that case, the Supreme Court stated that:

“The conflicting decisions or decisions which undermine each other from two or more different judges over the same subject matter.”

Mr. H. H. Ndhlovu, SC submitted that therefore, in the present case, there could not be any conflicting decisions because Hon. Walusiku did not make any decision on the facts in dispute and that the decision to be made in cause number 2010/CRMP/514 would not conflict with any other decision as there is no other decision on the matters in contention.

He further submitted that the commencement by the respondent of cause number 2010/CRMP/514 is not an abuse of court process because the only way to attack the order that was made by Hon. Walusiku was by commencing a fresh action since the said order appeared to have been consented to by the parties.

Learned State Counsel submitted that in the circumstances and in the interest of justice, they were urging the court to uphold the ruling by Hon. Chilembo in the court below.

I have carefully considered the grounds of appeal and heads of argument by Counsel for the appellant and the appellant's reply to the respondent's submissions. At the onset, I observed that Counsel for the appellant acknowledged that cause number 2009/CRMP/1040 that was before Hon. Walusiku was dismissed after it was struck of the active cause list and the plaintiff did not restore it. Therefore, the said action having been dismissed and the decision not having been challenged means that the same cannot be revisited contrary to Mrs. Tresha's contention. Therefore, the possibility of having two conflicting decisions cannot arise as cause number 2009/CRMP/1040 was dismissed and is dead and buried and cannot be resurrected. In the circumstances, therefore, there was nothing to prevent the respondent from filing a fresh action since the earlier action had not been heard and determined on the merits and no decision was rendered. Further, there is no law that precludes a party from commencing a fresh action when his action is dismissed on the ground of irregularity or some other technically and such commencement cannot be perceived as abusing the court process.

In view of the foregoing, I support learned State Counsel's submission that the cases cited and referred by the Counsel for the appellant were out of context in terms of application to the present case. I am further of the considered view that learned Counsel for the appellant seems to have misunderstood the context in which the Supreme Court frowned upon the commencement of fresh actions which it termed multiplicity of actions. The multiplicity of actions in this context meant commencement of a number of actions based on the same claim in different court with a view of hoping to get a favourable result in at least one of them in what is termed forum shopping. From the facts of the present case, I am not satisfied that this was the position as one action was dismissed on a technicality being failure to restore in time and a fresh action commenced and so it is not as if there are two parallel actions at present.

Therefore, I find that Hon. Magistrate Chilembo was on firm ground when she ruled that there was no multiplicity of actions and she, therefore, did not err in law and fact as alleged by the appellant. That being the case, I find that this appeal has no merit and I dismiss it accordingly and order the appellant to bear the costs and the same to be taxed in default of agreement.

DATED this.....day of October, 2012 at Lusaka.

.....
F. M. Lengalenga
JUDGE