

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

2014/HP/1913

BETWEEN:

TOBBY CHINGUMBE MALITI

PLAINTIFF

AND

MUHABI LUNGU

1ST DEFENDANT

RUPIAH BWEZANI BANDA

2ND DEFENDANT

BEFORE The Honorable Mr. Justice I. C. T. Chali in Chambers, at Lusaka, the 11th day of December, 2014.

For the Plaintiff:

Mr. F. Besa, Messrs. Besa Legal Practitioners.

For the 1st Defendant:

Mr. A. J. Shonga Jr, SC with Mr. N. Ngandu, Messrs. Shamwana & Co. with Mrs. D. Findlay, Messrs. Findlay & Associates.

For the 2nd Defendant:

Mr. M. Zulu, Messrs. Makebi Zulu Advocates.

R U L I N G

Cases referred to:

1. *Hunter v. Chief Constable of the West Midlands Police* (1982) AC 529.
2. *Mundia Sikatana v. Attorney General* (1982) ZR 109.
3. *BP Zambia Plc v. Interland Motors Limited* (2001) ZR 37.
4. *Miles Sampa v. Bridget Atanga & Another* 2014/HP/1922.

5. *Kelvin Hang'andu & Company (A firm) v. Webby Mulubisha (2008) 2 ZR 82.*

Legislation referred to:

1. *Supreme Court Rules (White Book), 1999 Edition.*

On 2nd December, 2014 the Plaintiff commenced an action by way of Writ of Summons against the two Defendants seeking the following reliefs:

- (i) A declaration that the meeting held by the 1st Defendant to adopt, choose or sponsor the 2nd Defendant as the Movement for Multiparty Democracy (MMD) Presidential Candidate in the January, 20th, 2015 Presidential Election is null and void *ab initio*;
- (ii) A declaration that the process employed by the 1st Defendant in adopting, choosing, electing or sponsoring the 2nd Defendant as the Movement for Multiparty Democracy Presidential Candidate in the 20th January, 2015 Presidential Election is illegal and null and void *ab initio* or wrong;
- (iii) A declaration that as a member of the 1st Defendant, the Plaintiff is entitled to be elected or afforded an opportunity by the 1st Defendant to be adopted, elected or sponsored as Movement for Multiparty Democracy Presidential Candidate for the 20th January, 2015 Presidential Election by the 1st Defendant;

- (iv) An injunction restraining the 2nd Defendant whether by himself, his agents or servants or whosoever from holding himself out as the Presidential Candidate adopted, chosen, elected, sponsored or whatsoever by the MMD in the 20th January, 2015 Presidential Election and from filing nomination as the Presidential Candidate adopted, chosen, elected or sponsored by the MMD in the 20th January, 2015 Presidential Election until the determination of this matter or further order of the Court;
- (v) An injunction restraining the 1st Defendant whether by himself, or agents from continuing to present the 2nd Defendant as the Presidential Candidate of the MMD in the 20th January, 2015 Presidential Election until determination of this matter or further order of the Court;
- (vi) Costs.

The writ of summons was accompanied by a statement of claim in which the Plaintiff expounded the basis of his claim for such relief. For expediency I do not propose to delve into the details of his pleadings in this ruling.

The Plaintiff also applied *ex parte* for an order of interim injunction pursuant to Order 27 of the High Court Rules, Chapter 27 of the Laws of Zambia as read with Order 29 of the Supreme Court Rules of England

(White Book), 1999 Edition. The application was supported by an affidavit sworn by the Plaintiff. However, I directed that the application be heard *inter partes*. This was in order that I do not deal with the application in a piece meal fashion considering the apparent seriousness and urgency of the matter. The Plaintiff's Counsel accordingly filed an *inter partes* summons which I directed to be heard on 11th December 2014 after the 1st Defendant had filed an affidavit opposing the injunction application.

However, before I could hear the injunction application, Counsel for the 1st Defendant filed notice of intention to raise preliminary issue pursuant to Order 33 Rules 3 and 7 of the Supreme Court Rules (White Book) 1999 Edition. The following were the issues raised in the notice which were also amplified in the affidavit in support thereof sworn by the 1st Defendant:

1. Whether, there being a pending action under Cause Number 2014/HP/1870 between Nevers Sekwila Mumba and Muhabi Lungu (In his capacity as National Secretary of the Movement for Multiparty Democracy) seeking a declaration that the meeting of the National Executive Committee of the MMD held on 18th November, 2014 is null and void *ab initio*, this action is not in fact multiplicity of actions, abuse of Court process and forum shopping as it relates to and involves the same meeting of 18th November,

2014, currently subject matter before this Court wherein the Plaintiff seeks the same relief, namely, a declaration that the meeting held on 18th November, 2014 is null and void and of no legal consequence;

2. Whether or not this action can properly be sustained before this Court in light of the fact that the same relief is sought before another Court, resulting from the same events and circumstances, namely, the meeting of 18th November, 2014 which would result in conflicting decisions over the same issue by two High Court Judges;
3. Whether or not an injunction application can be sustained in a matter that is clearly an abuse of Court process, multiplicity of actions and forum shopping.

The Plaintiff swore an affidavit in opposition to the notice on the preliminary issue. He attacked the raising of the preliminary issue as a ploy deliberately and carefully calculated to delay the hearing of the urgent injunction application. He denied that his case amounted to a multiplicity of actions, abuse of Court process or forum shopping. He said he was not a party in Cause Number 2014/HP/1870 and that the relief he seeks in this action is different. He said he has not commenced any action in any Court in Zambia in relation to what he claims in this case. He further deposed that he was not under any obligation to find out if there was similar litigation before the Courts before he could commence his own action seeking reliefs peculiar to himself. He said

that should this Court be of the view that all the disputes arising from the deliberations of the 1st Defendant's NEC meeting of 18th November, 2014 ought to be determined together before a single Judge, then the correct and fair thing to do would be to direct the parties to have the two actions consolidated and not to dismiss one of the two because that would leave the Plaintiff without a remedy and effectively shut him out. However, he said, such consolidation ought to be after the hearing and determination of his injunction application before the dates set for the filing of nominations before the Electoral Commission of Zambia.

I have read the statement of claim in Cause No. 2014/HP/1870 in which Dr. Mumba sued Mr. Muhabi Lungu who is also the 1st Defendant in this case. That action was commenced on 24th November 2014, and the Plaintiff herein is indeed not a party to it. It centres on the events leading to the adoption on 18th November 2014 of Mr. Rupiah Bwezani Banda, the 2nd Defendant in the case before me, as the Presidential Candidate of the MMD at the 20th January 2015 Presidential Election, and the decision by the NEC to suspend Dr. Mumba as MMD Party President pending further disciplinary proceedings. In that action Dr. Mumba seeks the following reliefs:

1. A declaration that his purported suspension from the office of MMD President was wrongful, illegal and null and void *ab initio*;
2. An order for his reinstatement or restoration as MMD President;

The common position of Counsel for the Defendants as argued by Mrs. Findlay was that clearly and unambiguously the two actions have a common issue or question sought to be determined before two different Courts of same powers and jurisdiction. They argued that although the Plaintiffs in the two actions are different, it is apparent that there is a common issue that the parties seek to be determined, which issue relates to and arises from the same events and circumstances. Moreover, since the two actions are before different Judges, they may result in conflicting decisions, they argued.

The Courts have always frowned upon situations where a Judge is called upon to determine the same issue as that already adjudicated upon by or under consideration before another Judge of equal jurisdiction, power and authority (See, for example, the case of *MUNDIA SIKATANA v. ATTORNEY GENERAL* (1982) ZR 109).

And the Supreme Court has held in the case of *BP ZAMBIA PLC v. INTERLAND AND MOTORS LIMITED* (2001) Z.R 37:

“The administration of justice would be brought into disrepute if a party managed to get conflicting decisions which undermine each other from two or more different Judges over the same subject matter.”

I have indeed considered the argument raised by Counsel for the Plaintiff to the effect that the Plaintiff in this case is not a party in Cause No. 2014/HP/1870. That is very true. However, as I have observed in a recent ruling on a similar matter in the case of MILES SAMPA v. BRIDGET ATANGA & ANOTHER 2014/HP/1922 **“there has been lately a flurry of “political cases” before the Courts between members of some political parties over, among other issues, the mode of electing party leaders and their potential candidates for the forthcoming Presidential election. Those cases have been widely reported in both the print and electronic media or online publications. The Plaintiff in this case ought to have been aware of the earlier case I have cited including the result. Therefore, I find that by bringing a separate action on a matter which has already been adjudicated upon by the High Court, the Plaintiff has abused the process of the Court.”**

I think my remarks in the SAMPA case equally apply to this case especially when one examines the statements of claim in this case and in Cause No. 2014/HP/1870 which appear to me to have been penned by the same draftsman. The Plaintiff had therefore the opportunity to join himself in the earlier action than to belatedly hope for the consolidation of this case with the other by the Court. The principle relating to avoidance of a multiplicity of actions must apply even though the Plaintiffs are different in the two cases.

Indeed the Plaintiff's conduct has been rightly described as forum shopping, a very detestable conduct.

There was also an argument by Counsel for the Plaintiff that the Plaintiff was entitled to take out his own action rather than to hitch a ride on Dr. Mumba's back in Cause No. 2014/HP/1870. Gratefully, the short answer to that argument was provided by Mrs. Findlay by way of the decision of the Supreme Court in the case of KELVIN HANG'ANDU & COMPANY (A FIRM) v. WEBBY MULUBISHA (2008) 2 ZR 82 where that Court held:

"Once a matter is before Court in whatever place, if that process is properly before it, the Court should be the sole Court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular Court. Forum shopping is abuse of process which is unacceptable."

The net result is that all the three issues raised in the notice are upheld and the action, including the application for an injunction, cannot be sustained. The action is therefore dismissed.

I order that the Defendants shall have their costs, said costs to be taxed if not agreed.

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Leave to appeal is granted.

Delivered in Chambers, at Lusaka, the 12th day of December, 2014.



I. C. T. Chali
JUDGE