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IN THE HIGH COURT FOR ZAMBIA **2013/HP/1843**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

LION RESOURCES LIMITED **1st PLAINTIFF**

AVARMMA MINING COMPANY LIMITED **2nd PLAINTIFF**

AND

VEN MINNING AND CONSTRUCTION LIMITED **DEFENDANT**

BEFORE : **HON. G.C. CHAWATAMA - IN CHAMBERS**

For the Plaintiff : *Mr. Nganga Yalenga- Nganga Yalenga & Associates*

For the Defendant : *Mr. Milner Katolo and Mr. Sikazwe- Milner Katolo & Associates*

RULING

CASES REFERRED TO:

1. ***Kelvin Hangandu and Company Vs Webby Mulwila (2008) ZR 82***
2. ***The Registered Trustees of Archdiocese of Lusaka Vs. Office Machine Services Limited, SCZ No.18 of 2007***
3. ***DBZ and KPMG Peat Marwick Vs. Sunvest Pharmaceuticals Limited (1995-1997) ZR 187 DBZ and KPMG Peat Marwick Vs. Sunvest Pharmaceuticals Limited (1995-1997) ZR 187***
4. ***Mukumbuta Mukumbuta & Others Vs. Mongu Meat Corporation Limited & Others (2003) ZR 55 Mukumbuta Mukumbuta & Others Vs. Mongu Meat Corporation Limited & Others (2003) ZR 55***
5. ***BP Zambia PLC vs. Interland Motors Limited (2001) ZR 37***
6. ***Balamoan Vs Aidan Gaffney (1971) ZR 29***
7. ***Turnkey Properties Vs Lusaka West Development (1984) ZR 85.***

AUTHORITIES REFERRED TO:

1. **Order 2 Rule 2 of the Rules of the Supreme Court (RSC) 1999 Edition.**
2. **Order 14A of the Rules of the Supreme Court (RSC) 1999 Edition.**
3. ***Section 200 of the Companies Act Chapter 388 of the Laws of Zambia***
4. ***Sections 10 and 11 of the Partnership Act 1980***

This is an application by the Defendant to raise preliminary issues on a point of law pursuant to **Order 14A of the Rules of the Supreme Court (RSC) 1999 Edition.**

In this matter the Plaintiffs, Lion Resources Limited and Avarmma Mining Limited, by way of Writ of Summons and Statement of Claim seek the following reliefs against the Defendant Ven Mining and Construction Limited:

1. *An order that the Defendant is conducting mining operations in the Plaintiff's prospecting area.*
2. *An order to compel the Defendant to vacate the said area.*
3. *Damages for trespass*
4. *Mesne profits*
5. *An order for interim injunction*
6. *Costs*
7. *Interest*
8. *Any other relief that the court may deem fit.*

Counsel for the Defendant, Mr. Sikazwe informed the court that the notice of intention to raise a preliminary issue raised two issues. Counsel further stated that they would rely on a notice filed on 16th January, 2014 together with an affidavit, deposed to by ***Chris Broodryk***, in support of the notice and a list of authorities.

He went on to state that relating this holding to the circumstances at hand, Lion Resources is an interested party under cause ***2013/HP/1558*** and so is the Defendant Ven Construction Zambia Limited. ***Order 14 of the High Court Rules*** is very instructive on the procedure an interested party should take. The Plaintiffs herein ought to have followed that procedure. Counsel submitted that this action amounted to an abuse of court process and a multiplicity of actions.

Counsel pointed out that that the court would note from the exhibits filed in support of this application that under cause ***2013/HP/1558***, the Plaintiff was granted an ex-parte injunction which was confirmed by Judge Sichinga (SC) in the ruling delivered in January, 2014 following an inter-parte hearing. The Plaintiffs in this cause obtained a similar relief, this is multiplicity of actions.

Counsel referred the court to another case of ***The Registered Trustees of Archdiocese of Lusaka vs. Office Machine Services Limited, SCZ No.18 of 2007*** where it was held that:

> ***"Indeed this court has on many occasions expressed its displeasure of multiplicity of actions over the same subject matter...."***

Another case of ***DBZ and KPMG Peat Marwick vs. Sunvest Pharmaceuticals Limited (1995-1997) ZR 187*** the Supreme Court held that:

> "***The injunctions should be quashed because there is already an action on the same subject matter and the Court does not approve of the commencement of multiplicity of procedures, proceedings and actions***

in different Courts which may result in Courts making contradicting decisions on the same matter"

Counsel argued that this action amounted to multiplicity of actions and that the Supreme Court decisions are instructive on this. The Judges of the High Court should speak with one voice and hence it is undesirable to allow a situation where there are contradictory declarations and judgments by this court.

They prayed that the court finds merit in the preliminary issue raised and dismisses this action with costs to the Defendant.

Mr. Katolo augmented Mr. Sikazwe's position by stating that the court should frown upon the conduct of the Plaintiff in commencing multiplicity of actions. A close look at exhibit "***CB2***" in the affidavit in support will show the court that the defence and counterclaim under ***2013/HP/1558*** was filed by Messrs Nganga Yalenga & Associates on behalf of Avarmma with the full knowledge that Avarmma is a party to that action. Counsel urged the court to condemn this action in the strongest terms. Counsel submitted that this was made clear in the case of ***Mukumbuta Mukumbuta & Others vs. Mongu Meat Corporation Limited & Others (2003) ZR 55*** where it was held inter alia that:

"***In view of the fact that advocates for the respondents deliberately and consciously went forum shopping resulting in the parties being before several High Court Judges, it is the advocates for the respondents and not the respondents who should be punished in costs."***

Mr. Katolo submitted that Counsel has a duty to the court to avoid commencing a multiplicity of actions. This is a clear case of a failure of the duty which must result in costs in accordance with this judgment. By coming to this court to obtain an interim injunction with the full knowledge that there is another injunction subsisting before another court is daring two courts with the same jurisdiction and can bring the administration of justice into serious disrepute.

Furthermore, Counsel cited the case of ***BP Zambia PLC vs. Interland Motors Limited (2001) ZR 37*** where the Supreme Court held as follows:

> "***For our part we are satisfied that, as a general rule, it will be regarded as an abuse of the process if the same parties relitigate the same subject matter from one action to another or from Judge to Judge. In conformity with the courts inherent power to prevent abuse of its process, a party in dispute with another over a particular subject should not be allowed to deploy his grievance piece meal in scattered litigation and keep on hauling the same opponent over the same matter before various courts. 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 judges over the same subject matter."***

Counsel went on to state that this is what had transpired in the case where we have two conflicting injunctions, one in favour of the Plaintiff and another one against Arvamma in the matter before Judge Sichinga SC. He urged the court to dismiss this action for being a clear abuse of the court process and condemn Counsel in costs for failing in his sublime duty to the court.

Mr. Katolo further submitted that regarding the second issue, the court would note that exhibit "**CB8**" a Certificate of Registration from the Zambia Development Agency for the Defendant herein shows the address of the defendant as Papala Farm Solwezi Main Road. There was no affidavit of service before this court to show that process was served at the said premises. ***Section 200 of the Companies Act Chapter 388 of the Laws of Zambia*** makes it clear that service of process at a Company must be affected at the registered office, as the way it was done herein renders service a nullity and consequent orders made on the belief that service was properly effected will be liable to be set aside for lack of proper service.

Counsel requested the court to set aside service, process and discharge the injunction which was made without prior disclosure to this court that there was in existence another. Counsel prayed that the whole matter be dismissed.

In reply, Mr. Yalenga informed the court that they would rely on the affidavit in opposition deposed to by ***Lulenga Bweupe*** dated 24th January, 2014.

Counsel submitted that order ***14A of the RSC, 1999 Edition*** under which the Defendant brought the application makes it a mandatory requirement for the party making the application under that order to have filed a notice of intention to defend.

He contended that the Defendant has not filed a defence or indeed a notice of intention to defend and hence he submitted that this application was misconceived and misplaced.

Counsel further submitted that in the alternative the issues raised in this case and the case of Kasempa Community Mining and Natural Resources Management Foundation Limited, Cause number ***2013/HP/1558*** are distinct and separate and are against separate parties.

Counsel went on to submit that the question whether the Second Plaintiff in this matter could hide behind the First Plaintiff and the relationship it had with the Second Plaintiff as regards the claim brought by Kasempa Community and Natural Resources Management Foundation Limited was dealt with by Hon. Judge Sichinga SC in the ruling of 18th November, 2013 which the Defendant has exhibited as "***CB6***", with the relevant portions being on pages 2 to 3.

It was Counsel's contention that the claim against the Second Defendant by another company is one of tort of trespass. He submitted that the cardinal principle in as far as legal personality is concerned is that a Company is a separate and distinct personality in law. The Plaintiffs are not in any way claiming that the purported joint venture between the Defendant and Kasempa Community and Natural Resources Management Foundation is invalid.

Counsel contended that the claim was that way before the purported joint venture between the Defendant and Kasempa Community and

Natural Resources Management Foundation and Ven Construction Zambia Limited, the Defendant has been conducting illegal mining operations in the area covered by the First Plaintiff's Mining Licence. He went on to state that the Plaintiffs did file an exhibit "***LB14***" an order for interim injunction and that document and a document dated 30th April, 2013 and issued by Ministry of Mines clearly shows and states that the Defendant under a joint venture with H&S Mining were mining as opposed to prospecting in the First Plaintiff's licenced area. From the documents exhibited by the Defendant in an effort to show that it was a joint venture with Kasempa Community exhibited a letter marked ***"CB5"***. Counsel referred the court to paragraph 2 of ***CB5*** and concluded that it shows that the Defendant prior to the existence of the joint venture under cause ***2013/HP/ 1558*** was already conducting mining. It was Counsel's submission that under ***sections 10 and 11 of the Partnership Act 1980***, it is clear that liability of partners is joint and several and a party can bring several actions against the partners.

On the issue of irregular service, Counsel submitted that the understanding of statutory interpretation draws a distinction between the words 'may' and 'shall' and section 200 of the Companies Act states that service 'may' be effected and not 'shall'.

It was submitted that the Defendant relies on ***Balamoan v Aidan Gaffney (1971) ZR 29,*** we wish to distinguish that case from the present one. In that case the High Court was refusing the Plaintiff's contention following an issue that was raised by the defendant that the court must consider the whole process a nullity because his service was irregular. In dismissing the Plaintiff's contention the court held that even if the

whole process was irregular the Defendant was entitled to enter appearance to safe guard his interest. Service though made at a mine site was regular as it was served on the Managers of the Defendant. Furthermore, the Defendant by relying on "***CB8***" for the address of service as opposed to the official notice from PACRA is admitting that currently its address of service is only known to itself. Counsel thus prayed that the court may find that in respect of this claim the Plaintiffs have sued the right wrong doer and that there has been no multiplicity of actions and consequently no abuse of the court process.

In reply Mr. Katolo stated that there has been submissions that the application is irregular because of none compliance with the mandatory requirement to file a notice to defend. The Defendant filed a conditional appearance on 20th January, 2014 and raised this application before this court. It was submitted that filing a memorandum of appearance and defence would have amounted to waiver of the irregularity and would have precluded the Defendant from filing the application before the court.

I have perused this file as well as the Writ of Summons and Statement of Claim under cause number **2013/HP/1558** which is exhibit **"CB1"** on the affidavit in support of notice of intention to raise a preliminary issue on a point of law deposed to by **Chris Broodryk**.

While this matter is between **Lion Resources Limited** and **Avarmma Mining Company Limited** and **Ven Mining and Construction Limited**, the matter under cause **2013/HP/1558** is between **Kasempa Community Mining and Natural Resource Management Foundation Limited** and **Avarmma Mining**

Company Limited. According to paragraph 5 of the Statement of Claim under this cause, **Avarmma Mining Limited** is the successor in title to **Lions Resources Limited**. Therefore in essence under cause **2013/HP/1558, Avarmma Mining Company Limited** is being sued and under this cause **Avarmma Mining Company Limited** is suing **Ven Mining and Construction Company Limited** who is a strategic partner to **Kasempa Community Mining and Natural Resources Management Foundation Limited**, the two having had entered into a joint venture for purpose of explorations under Prospecting Licence No. **19076-HQ-LPL**. At this point I can safely say that the parties under both causes are the same.

Secondly, both matters are over a dispute over exploration rights in the same area that is Nyoka area in Kasempa as can be seen from both the Statement of Claim and Counterclaim under cause 2013/HP/1558 and the Statement of Claim herein.

I do agree that this amounts to duplicity of actions, which is an undesirable conduct by Counsel. It is an abuse of the court process especially where Counsel knows that there is an injunction subsisting before my learned brothers court over the same area goes ahead to obtain another injunction before my court.

As cited by Mr. Katolo, above, the Supreme Court made it clear in the case of ***DBZ and KPMG Peat Marwick vs Sunvest Pharmaceuticals Limited (1995-1997) ZR 187*** that:

> "***The injunctions should be quashed because there is already an action on the same subject matter and the Court does not approve of the***

commencement of multiplicity of procedures, proceedings and actions in different Courts which may result in Courts making contracting decisions on the same matter"

The injunction granted by my brother Judge Sichinga should be sufficient to maintain the status quo. Should Counsel not have been happy with the grant of the said injunction there was still an option of appeal available to him. I am sure Counsel is alive to the fact that an injunction is not a tool that one can use to create new conditions favorable only to himself. (***Turnkey Properties v Lusaka West Development (1984) ZR 85).***

The reason for the avoidance of multiplicity cannot be overemphasized. It is for the preservation of the integrity of the administration of justice ***which would be brought into disrepute if a party managed to get conflicting decisions which undermine each other from two or more judges over the same subject matter.***

Concerning the issue of service, ***Section 200 of the Companies Act, Cap 388*** provides that:

*"1) A document **may** be served on a company by:*

(a) leaving it at the registered office of the company; or
(b) personal service on a director or secretary"

The Plaintiff's Counsels' argument was that it was because of the use of the word *"may"* in the act, it was not mandatory for service to be effected as provided under section 200.

Counsel construed the term in a narrow sense. The authors of Black's Law Dictionary, Sixth Edition at page 979 have defined "*may*" as:

> ***"An auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency."***

They have further stated that:

> *"The word "may" usually is employed to imply permissive, optional or discretional, and not mandatory action or conduct.*
>
> *However, as a general rule, the word "may" will not be treated as a word of command* ***unless there is something in context on subject matter of act to indicate that it is used in that sense.***
>
> *In construction of statutes...the word "may" as opposed to "shall" is indicative of discretion or* ***choice between two or more alternatives, but context in which the word appears must be the controlling factor."***

I opine that considering the context in which "*may*" is used under **section 200 of Cap 388**, it implies a choice between the two alternatives provided there under, that is:

a) *leaving it at the registered office of the company; or*
b) *personal service on a director or secretary,*

I do not think that *"may"* under section 200 means that the party serving will have a choice of not effecting service as provided by the said section.

Lastly, ***Order 2 R 2(1) RSC, 1999 Edition,*** provides that:

> ***"An application to set aside for irregularity any proceedings, any step taken in any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not he allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity."***

In explaining a fresh step, the note there under provides as follows:

> ***2/2/4 A "fresh step" for the purpose of this rule is one sufficient to constitute a waiver of the irregularity.***
>
> ***...Thus steps taken with knowledge of an irregularity, either with a view to defending the case on its merits or to obtain an advantage such as security for costs will waive the irregularities in the institution or service of proceedings, since they could only usefully be taken on the basis that proceedings were valid. But steps reasonably taken to assert an objection cannot amount to a waiver of it.***

Under that order, it was stated that entering a conditional appearance and obtaining extensions of time and an order to inspect documents with a view to objecting to the jurisdiction did not amount to a waiver.

Upon perusal of the court record I see that the Defendant have filed a conditional appearance, that will suffice to safe guard their interest. According to the rules, filing a defence will amount to a waiver of the irregularity.

I dismiss this action for being a multiplicity of actions and an abuse of the court process. The injunction granted to the Plaintiffs herein is hereby discharged. I award costs occasioned by this action this far to the Defendant.

DELIVERED AT THIS 14TH DAY OF AUGUST 2014.

G.C.M CHAWATAMA
JUDGE