

IN THE HIGH COURT FOR ZAMBIA 2014/HP/0306
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

SYACHOKE SIMEMEZA
AND 2858 OTHERS

PLAINTIFFS

AND

NELLY B.K. MUTTI
(T/A LUKONA CHAMBERS)

1ST DEFENDANT

THE ATTORNEY GENERAL

2ND DEFENDANT

Before the Hon. Mrs. Justice J.Z. Mulongoti
in Chambers on the 26th day of June, 2015.

For the Plaintiffs: *Mr. R. Malipenga of Robson Malipenga & Company*

For the 1st Defendant: *Mr. M. Chitambala of Lukona Chambers*

For the 2nd Defendant: *N/A*

R U L I N G

Cases referred to:

1. *Bellamano V Ligure Lombarda Limited (1976) ZR 267*
2. *National Milling Company Limited V Vashee (suing as chairman of the Zambia National Farmers' Union) (2000) ZR 1998*
3. *Secretary-General of the United National Independence Party V Elias Marko Chisha Chipimo (1983) ZR 125 (S.C)*
4. *Zambia Revenue Authority V Jayesh Shah (2001) ZR60*

Legislation referred to:

1. *Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia*
2. *Order 18 Rule 19 of the Rules of the Supreme Court, 1999 Edition (white book)*
3. *Rule 16(3) of the Legal Practitioners' Practice Rules 2002*

Other works referred to:

1. *Halsbury's Laws of England, Vol. 5, 3rd edition paragraph 648.*

The ruling is for the plaintiffs' application for an order to strike out or set aside the writ of summons and statement of claim for irregularity and being an abuse of court process. The application was made by summons pursuant to Order III Rule 2 of the High Court Rules as read with Order 18 Rule 19 of the Supreme Court Rules of England, 1999 edition (white book). The application was supported by an affidavit sworn by one Moses Chitambala, the 1st defendant's advocate.

He deposed, *inter alia*, that the plaintiffs commenced this action by way of writ of summons claiming, *inter alia*, a refund in the sum of K51,571,097.29. He stated that the writ was issued by their advocates Messrs Robson Malipenga and Company without authority from the 2859 plaintiffs as evidenced by the letter dated 4th January, 2014 exhibited as "MC1". He stated that he reasonably believes that with the exception of the individuals who signed the letter marked "MC1" the said Robson Malipenga and Company had no authority to issue the writ on behalf of the rest of the plaintiffs.

He further deposed that a search conducted on 26th May, 2011 revealed that the Voluntary Separatees Association of Zambia (VSAZ) was de-registered on 26th May, 2011

and therefore did not exist at the time Robson Malipenga and Company purports to have received instructions to sue the defendants.

The plaintiffs opposed the application and filed an affidavit in opposition sworn by the 1st plaintiff, one Syachoke Simemeza. He deposed, *inter alia*, that all the listed plaintiffs gave instructions to Messrs Robson Malipenga to act for them and have individual receipts for legal fees. That their actual retainer letter is the one exhibited as "SES1" dated 4th January, 2014. He swore that the belief by the 1st defendant that only those who appended their signatures gave instructions to the lawyers is wrong. That Moses Chitambala was not their advocate and thus not in a position to state whether or not the plaintiffs retained Robson Malipenga to act for them.

He further stated that the decision to deregister the plaintiffs' association was reversed as shown by the letter dated 4th June, 2014 (exhibit "SES6") authored by the Registrar of Societies rescinding the decision.

At the hearing, on 1st June 2015, the 1st defendant was not ready to proceed. The Court then directed that it would proceed by way of considering the affidavit

evidence and gave the parties leave to file written submissions. Accordingly, the matter was adjourned for ruling.

Learned counsel for the 1st defendant filed skeleton arguments in support of the application. He argued that Messrs Robson Malipenga and Company had no authority to issue the writ of summons and statement of claim on behalf of the plaintiffs because the instructions were purportedly issued by the VSAZ which was not a party to the earlier action of Nasando Isikanda & Others V Attorney General: 2002/HP/1055. He relied on Rule 16(3) of the Legal Practitioners' Practice Rules of 2002 which provides that a practitioner shall not offer services without instructions from a client.

He added that the writ could not have been issued on the instructions of the VSAZ because it was de-registered at the time and was for all intents and purposes non-existent. He cited the case of **Bellamano V Ligure Lombarda Limited(1)** in which it was held that the issue of a writ without authority is an abuse of court process and the appropriate remedy is an application to strike out the writ. He contended that the VSAZ has no capacity even after re-registration to sue or be sued and

cannot instruct an advocate to act on behalf of the plaintiffs herein. He relied on the case of **National Milling Company Limited V A. Vashee (suing as chairman of Zambia National Farmers Union)(2)**.

In the alternative, learned counsel submitted that the Court should strike out the plaintiffs' claim under item 1(a) where the plaintiffs seek determination of the capacity in which the 1st defendant acted for them in the earlier action, for being an abuse of court process. He argued that a thorough perusal of the writ and statement of claim demonstrates that since the commencement of proceedings under cause no. 2002/HP/1055, the 1st defendant has represented and continues to represent the plaintiffs herein with the exception of Mr. Syachoke Simemeza, the 1st plaintiff herein. The claim under item 1(a) is, therefore, frivolous and vexatious, or obviously unsustainable.

The plaintiffs' advocate filed skeleton arguments, the gist of which is that order 2 rule 1 of the Rules of the Supreme Court set out what amounts to an irregularity as failure to comply with the requirements on time, place, manner, form, content or any other respect. It is contended that the 1st defendant has failed to state

which rule has been breached save to attack Messrs Robson Malipenga and Company.

It was argued that the writ of summons and statement of claim reveal that the plaintiffs filed these proceedings in their individual capacity and together with a list of plaintiffs. That the VSAZ is not a party to these proceedings as the individual plaintiffs engaged Messrs Robson Malipenga and Company. In addition that the 1st defendant has failed to substantiate the reason it was paying a de-registered Association commissions of 2% if there was no connection with the plaintiff in the other case (2002/HP/1055) in which Isikanda Nasondo sued on his behalf and in his capacity as National Chairman of VSAZ.

Learned counsel for the plaintiffs also contends that the 1st defendant has also failed to disclose the names of its clients it purports are being represented by Robson Malipenga and Company. And that the 1st defendant should take legal action against the Association but not attempt to stop the plaintiffs who are claiming refunds from it. The court was urged to dismiss the application for lack of merit.

I have considered the affidavit evidence and the submissions by learned counsel. The application is premised on Order III Rule 2 of the High Court Rules as read with Order 18 Rule 19 of the white book. For the avoidance of doubt, Order III Rule 2 provides that:

“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”

In view of the above, the Court is entitled to make such interlocutory orders as are necessary for doing justice. The question I have to determine is whether it is necessary for doing justice to strike out the writ of summons and statement of claim for irregularity or being an abuse of court process.

I note that in the letter dated 4th January, 2014 which both parties have exhibited, the VSAZ was a party to the action under cause number 2002/HP/1055 acting through the Chairman Isikanda Nasando. I do not agree with counsel that the association was not a party to the previous action because the association being an unincorporated body does not have its own separate legal existence to sue or be sued like a company.

In the National Milling V. Vashee case, it was observed that:

“An unincorporated Association is not a legal person and therefore cannot sue or be sued.”

And that:

“where there are numerous persons having the same interest in any proceedings, the proceedings may begin and unless the court otherwise orders, continued by or against anyone or more of them as representing all or as representing all except one or more of them”.

The plaintiffs, through the 1st plaintiff, in their affidavit in opposition swore that all the plaintiffs engaged Messrs Robson Malipenga and Company to issue the writ on their behalf. The 1st defendant did not file an affidavit in reply to counter that statement.

I also concur with arguments by the plaintiffs counsel that the plaintiffs' sued the defendants in their personal capacity claiming money deducted from each of them.

In **Secretary-General of the United National Independence Party V Elias Marko Chisha Chipimo(3)**, the Supreme Court applied the provisions of Order XIV Rule 1 that if any plaintiff sues, or any defendant is sued, in any representative capacity, it shall be expressed on the writ. In the present case, the writ

shows that the plaintiffs are suing as “Syachoke Simemeza and 2858 others...” and not on behalf of the association. Granted, they described themselves as members of the VSAZ. I opine therefore, that it is immaterial whether the association was existent or non-existent at the time that the plaintiffs instructed their lawyers to issue the writ. And the action by the plaintiffs cannot be said to be an abuse of court process. I am thus not persuaded by the 1st defendant’s argument that the writ was issued without authority.

Further, according to Halsbury’s Laws of England “*It is a settled principle of common law that an unincorporated body has no legal entity capable of suing or being sued. It is equally a settled principle of law that where numerous persons have the same common interest or defence in a matter one or more may sue or be sued or the court may authorise one or more to defend on behalf of, or for the benefit of all*”.

The plaintiffs are therefore, in order to issue the writ in the name of the 1st plaintiff on behalf of the others. However, I note the contention by the 1st defendant that the plaintiffs with the exception of the 1st plaintiff are still her clients. And given the history of the case, I order

that a list with all the plaintiffs names be filed. I hasten to state that the list of plaintiffs alluded to by their counsel is not on the court's record.

Learned counsel for the 1st defendant also prayed in the alternative for an order to strike out endorsement 1(a) on the writ stating that the plaintiffs have acknowledged the capacity in which the 1st defendant represented them. I have perused the documents on record. I am of the considered view that determining that issue at this stage will pre-empt the outcome of the main matter. The issue ought to be determined at the trial of the action. The plaintiffs will have to show that they never retained the 1st defendant to act as advocates on their behalf. The 1st defendant will equally have to prove that they were retained to act as lawyers and have continued to act as advocates for the plaintiffs with the exception of the 1st plaintiff as alleged. I am fortified by the decision of the Supreme Court in the case of **Zambia Revenue Authority V Jayesh Shah(4)** that cases should be decided on their substance and merit where there has been only a very technical omission or oversight not affecting the validity of process.

In view of the foregoing, I refuse to strike out or set aside the writ of summons and statement of claim for irregularity and abuse of court process. Costs in the cause.

Leave to appeal is granted.

Delivered at Lusaka this 26th day of June, 2015.



**J.Z. MULONGOTI
HIGH COURT JUDGE**