

IN THE HIGH COURT FOR ZAMBIA

2014/HP/1612

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

CHRISTOPHER CHIPAMBALA KUNDA

APPLICANT

AND

WAWAKI ROOFING LIMITED

1ST RESPONDENT

TOM BANDA

2ND RESPONDENT

Before the Honourable Mr. Justice C.F.R. Mchenga S.C.

For the Applicant: M. Mwansa, EBM Chambers

For the 1st and 2nd Respondents: N. Kamwengo, Chilupe and Permanent Chambers

R U L I N G

The 2nd Respondent has pursuant to the provisions of Order 30 Rule 10 of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia, appealed against the learned Deputy Registrar's dismissal of his application for misjoinder made on the basis of Order 14 Rule 5 of the High Court Rules. Three grounds of appeal were advanced and

they read as follows:

1. *That the Learned Deputy Registrar erred in Law and fact in making a finding that the 2nd Respondent was in arrears of paying rentals when the 2nd Respondent was not a party to the Lease agreement between the Applicant and the 1st Respondent.*
2. *The Learned Deputy Registrar misdirected himself in both fact and Law by failing to recognise and appreciate that the 1st and 2nd Respondents are separate Legal entities independent of each other and therefore the 2nd Respondent cannot be sued for the debts of the 1st Respondent by the mere fact that the 1st Respondent was not operational without an application being made to pierce the corporate veil.*
3. *The Learned Deputy Registrar misdirected himself in Law and in fact by deciding that the 2nd Respondent cannot be misjoined from the proceedings on account that the 2nd Respondent had undertaken to pay the rentals in question when in fact they said undertaking was made by the 2nd Respondent on behalf of the 1st Respondent as a representative of the company and not in his personal capacity and despite the failure by the Applicant to provide evidence that such undertaking had been accepted by the Applicant so as to amount to an agreement that the 2nd Respondent failed to do so.*

The appeal is supported by an affidavit deposed by the 2nd Respondent. He deposed that the Applicant is seeking an order for the recovery of K151,000.00 for unpaid rentals on Plot No. 12115 Chinika, Mumbwa Road. He also deposed that the lease for that property is between the Applicant and the 1st Respondent; he is not a party to it. Further, he deposed that the letter in which he promised to pay the outstanding rentals was written on behalf of the 1st Respondent and not in his personal capacity.

In the affidavit in opposition to the notice of appeal, the Applicant deposed that on 16th June 2014, the 2nd Respondent wrote a letter promising and undertaking to liquidate rental arrears on behalf of the

1st Respondent. He also deposed that by a letter dated 28th June 2014, he accepted the commitment to pay the arrears.

At the hearing, Ms Kamwengo indicated that she was going to argue the 3 grounds of appeal as one. She referred to the case of **Dunlop v Selfridge [1915] AC 847** and submitted that since the 2nd Respondent is only a Director and Shareholder of the 1st Respondent and not a party to the lease agreement which is a subject of these proceedings, he cannot be held personally responsible for the 1st Respondent's unpaid rentals. She also referred to the case of **Salomon v A Salomom & Co. Ltd [1897]** and submitted that the 1st Respondent being a registered company, is a legal person separate from its members and its liability does not extend to them. Counsel submitted that this being the case, no action can lie against the 2nd Respondent because the alleged undertaking to pay rentals on behalf of the 1st Respondent is unenforceable. She submitted that this is the case because he was not acting in his personal capacity but as a representative of the company when he made the undertaking.

Ms Kamwengo also referred to the case of **Ethiopian Airways v Sunbird Safaris, SCZ Appeal No. 26 of 2007** and submitted that the obligation to pay rentals can only be imposed on the 2nd Respondent if there is evidence of fraud and the corporate veil is pierced. She submitted

that in this case, not only has there been no evidence of fraud but no application has been made to pierce the corporate veil; the 2nd Respondent is therefore not properly before the Court. She urged me to exercise my powers under **Order 14 Rule 5(2) of the High Court Rules** to strike him out and award him costs.

Submitting on behalf of the Applicant, Ms Mwansa referred to Black's Law Dictionary, 2nd Edition which defines an "undertaking" as being a promise, engagement or stipulation and submitted that the learned Deputy Register did no err when she found that the 2nd Respondent was rightly sued. She submitted that whether he was a party to the lease argument or not or he was a representative or not, he made the undertaking independent of his position as a representative of the company and the Applicant acted on his undertaking. She submitted that he has been joined to these proceedings because of the undertaking. She urged me to dismiss the appeal and uphold the learned Deputy Registrar's decision declining the application for misjoinder.

I am indebted to both Counsels for their submissions and I have taken them into account in arriving at my decision. **Order 14 Rule 4 of the High Court Rules** provides as follows:

"Where a person has a joint and several demand against two or more persons, either as principals or sureties, it is not necessary for him to bring before the Court as parties to a suit concerning that demand all the persons liable thereto, and he may

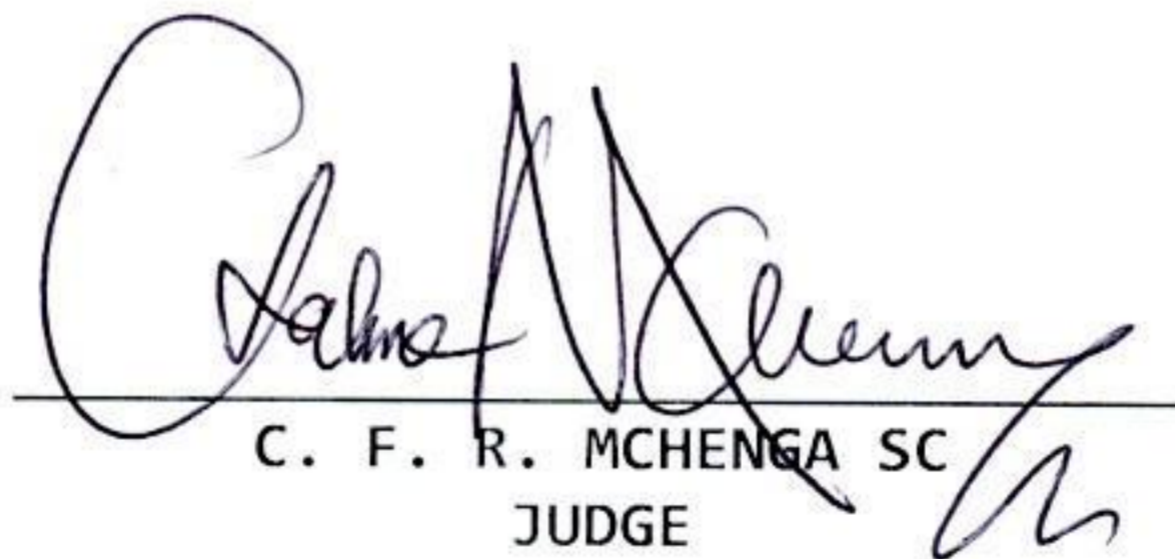
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proceed against any one or more of the persons severally or jointly and severally liable. Where a defendant claims contribution, indemnity or other remedy or relief over against any other person, he may apply to have such person made a party to the suit"

It follows, that since the Applicant claims that the 2nd Respondent made an undertaking to pay on behalf of the 1st Respondent, he has been properly joined to these proceedings. The questions whether he wrote the letter in his personal or representative capacity and whether as a result, he can personally be held responsible or not for the rental arrears, can only be determined after hearing the case on its merits.

Consequently, I find that the Learned Deputy Registrar was on firm ground when she held that the 2nd Respondent was properly joined to the matter. The appeal is dismissed with costs.

Delivered in chambers at Lusaka this 5th day of June, 2015


C. F. R. MCHENGA SC
JUDGE