

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPLE REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)



**2015/HP/0752**

BETWEEN

**ZAMBIA INTERNATIONAL HOTELS LIMITED**

**PLAINTIFF**

AND

**FIRST ALLIANCE BANK (Z) LIMITED**

**DEFENDANT**

Before the Hon. Mr. Justice C. Kajimanga this 29<sup>th</sup> day of June 2015

**FOR THE PLAINTIFF:** Mr. M. Zulu, Messrs Makebi Zulu Advocates

**FOR THE DEENDANT:** Ms. A. M. Theotis, Messrs Theotis Mataka and Sampa Legal Practitioners

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## **R U L I N G**

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**Cases referred to:**

1. Magnum (Zambia) Limited v Basit Quadri (Receiver/Manager) and Grindlays Bank International Zambia Limited (1981) ZR 141 HC
2. Avalon Motors Limited (In Receivership) v Bernard Leigh Gadsden and Motor City Limited SCZ Judgment No. 7 of 1998
3. Bank of Zambia v Chungu and Others SCZ Judgement No. 15 of 2008
4. Wynter M. Kabimba v The Attorney General and 2 Others 2011/HP/744

**Legislation referred to:**

1. The Rules of the Supreme Court (White Book) 1999 Edition, Order 33 rule 7 and Order 14A
2. The High Court Rules, Cap 27 of the Laws of Zambia, Order 3 rule 2, order 6 rule 1(4) and order 14 rule 5

The Plaintiff applied for and was granted an *ex parte* order of interim injunction which was returnable *inter-partes* on 4<sup>th</sup> June, 2015. At the *inter-partes* hearing, Ms. Theotis, Counsel for the Defendant raised a preliminary issue on a



point of law as to whether or not the Plaintiff has the *locus standi* to commence this action in light of the fact that the Plaintiff company is under receivership. The preliminary issue was raised pursuant to Order 33, rule 7 and Order 14A of the Rules of the Supreme Court 1999 edition. The affidavit in support of the preliminary issue sworn by Thula Nyasulu, an accountant of the Defendant Bank disclosed:

- “3. That the Defendant herein availed the Plaintiff company various facilities which were secured by way of Mortgage over Stand No. 20497, Lusaka and two Further Charges over the same property. Here now produced and collectively marked as exhibit “TN1” are copies of the said Deed of Mortgage and Further Charges.**
- 4. That the Plaintiff failed to meet the repayment terms of the loan facilities and on the 7<sup>th</sup> day of October 2014 the Defendant issued a 30 day Notice to the Plaintiff company to redeem the Mortgage and Further Charges which the Plaintiff company failed to do. Here now produced and marked as exhibit “TN2” is a copy of the statutory demand.**
- 5. On the 2<sup>nd</sup> day of March, 2015, the Defendant exercised its statutory power to appoint a Receiver. Here now produced and marked as exhibit “TN3” is a notice of appointment of Receiver which notice was duly registered at the Patents and Company’s Registration Agency (PACRA) and the same was duly advertised in the newspapers.**
- 6. That the appointment of a Receiver was within the rights of the Defendant and there was no irregularity in the appointment of the said Receiver.”**



In response to the preliminary issue, Mr. M. Zulu, Counsel for the Plaintiff relied on the affidavit in opposition sworn by Mr. Min Li in which he deposed:

- “5. That the Plaintiff applied for a loan of US\$2,500,000.00 on the 16<sup>th</sup> day of April 2011 through its then managing director, one Mr. Suresh Gupta, for purposes of completing the construction of the hotel. There is now produced and shown by me a copy of the application letter marked “ML 1”.**
- 6. That in a meeting held between the defendant and plaintiff, the defendant agreed to loan out US\$2,500,000.00 on condition that the same would be disbursed overtime.**
- 7. That it was agreed that repayment of the said loan would commence upon completion and operation of the hotel business. This was stated in the credit facility letters under the heading Repayment Arrangement. There is now produced shown by me copies of the credit facility offer/acceptable-loan letters collectively marked “ML 2”.**
- 8. That the Defendant only issued a loan of US\$1,300,000.00 and K500,000.00 less bank charges which was paid over a period of 1 year 6 months thereby causing the plaintiff to incur unnecessary expenses and consequently, delayed the process of the construction of the hotel which was to be completed within two years of the grant of the aforesaid loan.**
- 9. That on the 11<sup>th</sup> day of June 2014, the defendant wrote to the plaintiff asking it to settle the outstanding debt. The defendant demanded full settlement of the loan within 14 days failing which they would proceed with legal action. There is now produced and shown by me a copy of the said letter marked “ML3”.**



10. *That there was an increase in the interest rates from the rate first agreed when the plaintiff obtained the loan. That the defendant adjusted the interest rate and increased from 14% per annum to 16% per annum. It further increased to 28% per annum within the month of July 2014. There is now produced and shown by me copies of letters informing the plaintiff of the adjustments in interest rates collectively marked "ML4".*
11. *That the adjustments in the interest rates made by the defendant put a strain on the plaintiff thereby making it impossible for it to liquidate the sum borrowed.*
12. *That following the supposed default in payment of the loan, the defendant purportedly appointed a receiver and on the 4<sup>th</sup> day of March, 2015 an advert was placed in the Post Newspaper showing the appointment of one Mr. Chenge Chibanda, of Investment and Management Solutions Limited as Receiver and Manager of the Plaintiff company as of the 3<sup>rd</sup> day of March, 2015. There is now produced and shown by me copies of the newspaper advert and notice of appointment of Receiver or Receiver and Manager collectively marked "ML 5".*
13. *That the purported appointment of the receiver was only to be effected in the event that the plaintiff defaults payment which said repayment was to commence upon completion of the hotel and such a time that the plaintiff company was able to service its own indebtedness.*
14. *That no legal action was commenced and therefore the Plaintiff was not served with any court order or necessary court documents, if any, foreclosing the mortgaged property*



*and no order of sale was obtained by the defendant from court allowing them to sale the property.*

**15. That the plaintiff has not been served with the necessary Court documents if any or process as provided for by law that would warrant such appointment of a receiver.”**

He also relied on the list of Authorities and Skeleton Arguments filed in support of the affidavit in opposition to the notice to raise a preliminary issue. In the skeleton arguments, Mr. Zulu submitted that the case of **WYNTER M. KABIMBA V. THE ATTORNEY GENERAL AND 2 OTHERS 2011/HP/744** provides for the procedure to follow when one intends to raise a preliminary issue. The case cited illustrates that the appropriate procedure is for the Defendant to enter a conditional memorandum of appearance to show that the Defendant preserves arguments based on either lack of jurisdiction of the Court or irregularities with regards process and then file in a notice of intention to raise preliminary issue on either a point of law or fact or both. It further states that the Defendant's notice of intention to raise a preliminary issue should be in line with the conditional memorandum of appearance. In the instant case, the Defendant did not enter a conditional memorandum of appearance to preserve their arguments on either lack of jurisdiction of the Court or irregularities with regards process.

Mr. Zulu further submitted that there are requirements that are to be met before Order 14A Rule 1 of the Rules of the Supreme Court is invoked. Order 14A/1-2/3 of the Rules of the Supreme Court makes it clear that the determination of any question of law or construction under this Order can only be made if the Defendant has given notice of intention to defend. We submit that the Defendant did not meet the requirements provided for in Order 14A of the Rules of the Supreme Court. The Defendant did not give notice of intention to defend which said requirement is mandatory. There is nothing on record in



this case to suggest that the Defendant intends to defend or contest this matter or that he has any defence at all. Since the Defendant has not done so in this matter, the pre-requisite requirements under Order 14A have not been met and therefore the Defendant's application ought to fail.

He further submitted that the instant case sets out serious questions of law that can only be determined at trial thus Order 14A of the Rules of Supreme Court cannot be invoked as it will not determine the matter to finality. The determination leading to finality refers to substantive issues raised in the pleadings on merit. In our view, the questions of law raised by the Defendant in its notice of motion are inappropriate for determination under Order 14A for the obvious reasons that the requirement of finality cannot be met. Order 14A is intended to resolve a matter to its finality and not resolving technicalities.

The Defendant alleges that a receiver was appointed and therefore the Plaintiff cannot sue in its own name but in the name of the purported receiver. The Defendant relied on the case of **Magnum (Zambia) Limited V Basit Quadri (Receivers/Manager) & Grindlays Bank International Zambia Limited (1981) Z.R. 141 (H.C.)**. To distinguish the instant case from the case cited, it is not apparent that a receiver was appointed as the validity of the appointment of the receiver is what is at the core of this matter. Without going into the merits of this case, it would suffice to note that there was an agreement between the Plaintiff and the Defendant to repay the loan upon completion and operation of the hotel which said agreement has been breached by the Defendant. We submit that the purported appointment of the receiver by the Defendant was illegal and void ab initio as it was contrary to the Deed and agreement that governs the two parties. This therefore entails that it is as though the Plaintiff was never placed under receivership from the start and subsequently, giving the Plaintiff locus to sue the Defendant. He further



submitted that citing the Plaintiff as a company in receivership will entail that the Plaintiff agrees with the purported *status quo*.

He further submitted that it has been deposed in the affidavit in opposition to the notice of intention to raise a preliminary issue and not contested by the Defendant that the Defendant agreed with the Plaintiff that the repayment will commence after completion of the hotel based on an earlier agreement to finance K2.5m to be disbursed over time in parts. Upon the Plaintiff being financed with US \$1,300,000.00 and K500, 000,000.00 (KR500, 000.00) the loan was recalled and a receiver appointed against the agreement that the said loan would be repaid after completion of the hotel. Based on that the Defendant has appointed a receiver and the issue to be determined is whether the Defendant can rely on its own breach to settle the matter by way of Order 14A. He further submitted that this application is misplaced as no notice of intention to defend has been filed, neither is there a conditional memorandum of appearance.

In reply Ms. Theotis, submitted that the court will note that this application has been made pursuant to Order 33 rule 7 and Order 14A of the Rules of the Supreme Court.

It was her submission that if the court is of the view that the preliminary issue cannot be raised under Order 14A it can still be dealt with under Order 33 rule 7 which gives the Court the power and jurisdiction at any time to deal with preliminary issues.

With regard to the filing of a conditional appearance or notice to defend, she submitted that there is no provision under our laws for the filing of the notice to defend. Order 11 rule 1(4) of the High Court rules states that any person served with a writ under these rules may enter conditional appearance and apply by summons to court to set aside the writ on grounds that the writ is irregular or that the Court has no jurisdiction.



In this case the Defendant is not alleging any irregularity in the writ itself, neither is it questioning the court's jurisdiction. What it is doing is questioning the Plaintiff's *locus standi*. Order 2, rule 1(3) of the Rules of the Supreme Court defines irregularity under paragraph 6 which states that,

***“The power given to the Court by Order 2, r 1 is a power to cure irregularities consisting of failures to comply with the rules. There is no power to remedy failures of a more fundamental kind, thus the requirement that the Plaintiff be in existence at commencement of proceedings is a basic principle of law rather than a requirement of the rules”.***

Counsel contended that if an action is brought by a non-existent company it must therefore be struck out except in the case of a mere misnomer. The non-existent Plaintiff cannot apply to have another person joined as a co-Plaintiff. She submitted that in this case the Plaintiff ceased to exist in the form that it has commenced this suit as it is now in receivership.

Counsel argued that from the Plaintiff's own affidavit in support of the injunction the appointment of a receiver was duly registered at PACRA and duly advertised and that the only way in which they can challenge the appointment of a receiver would have been for directors or shareholders in their personal capacity to sue the Defendant and the receiver.

Ms Theotis further submitted that the Plaintiff cannot make an application within its' affidavit in opposition to this preliminary issue to substitute parties or add parties to the proceedings and this should not be entertained.

Counsel submitted that the Defendant does not dispute that directors and shareholders have a right to question or challenge the appointment of the receiver but we submit that this has to be done in the proper manner. She argued that since the Plaintiff company is in receivership, it is only the Receiver



who can commence an action in the name of the company and that the company should be cited as such. Counsel referred the Court to the cases of **Magnum (Zambia) Limited v Basit Quadri (Receiver/Manager and Grindlays Bank International (Zambia) Limited**<sup>1</sup>. **Avalon Motors Limited (In Receivership) v Bernard Leigh Gadsden and Motor City Limited**<sup>2</sup> and **Bank of Zambia v Chungu and Others**<sup>3</sup>. She accordingly prayed that the court grants this preliminary issue and dismisses the entire action with costs and discharges the interim injunction earlier granted by this court.

She further submitted that the Defendant had not delved into the merits or defended the allegations by the Plaintiff as they first wanted to address the *locus standi* of the Plaintiff. It was her prayer that the shareholders and directors who brought this action be the ones condemned in costs and not the receivers of the company.

I have considered the arguments of and the authorities cited by both counsel on the preliminary issue. As indicated above, the Defendant's application is made pursuant to Order 33, rule 7 and Order 14A of the Rules of the Supreme Court. Order 33, rule 7 provides as follows:

***"If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just."***

And Order 14A provides that:

***"The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the***



*proceedings where it appears to the Court that –*

- (a) Such question is suitable for determination without a full trial of the action, and*
  - (b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.*
- (2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.”*

The sole question for determination is whether the Plaintiff has *locus standi* to commence the action herein. Various arguments have been put forward by the Plaintiff, both in its affidavit in opposition and skeleton arguments on the propriety of the appointment of the receiver. In my view these arguments go to the substance of the dispute between the parties. They are not fit for determination in this preliminary issue.

It is common cause that the Defendant appointed a Receiver pursuant to the Mortgage and Further Charges executed in its favour by the Plaintiff company. This is acknowledged by both parties. It is trite law that where a Receiver is appointed by a creditor pursuant to a security document executed in favour of a creditor by a borrower, the company ceases to have its own independent existence from the receiver. From this premise it follows that only the receiver can sue in the name of the company. The company on its own cannot sue independently. The cases cited by the Defendant are instructive on this point. For example in the **Magnum (Zambia) Limited** case, the High Court stated as follows at page 145:

*“Quite clearly a company under receivership has no locus standi independent of its receiver. As long as a company continues to be*



***subjected to receivership, it is the receiver alone who can sue or defend in the name of the company. Accordingly, the action in its present form is dismissed.***”

I find that the **Magnum (Zambia) Limited** case where a similar preliminary, issue was raised is on all fours with the present case. On the basis of this authority, I hold that during the subsistence of the receivership, the Plaintiff company in the instant case has no *locus standi* to commence an action in its name. The action in its present form is therefore incompetent and must be dismissed. Whether or not the appointment of the receiver is fraught with impropriety is a substantive issue to be determined in an appropriate action and not in this preliminary issue. I also opine that this application is fit for determination either pursuant to Order 33 rule 7 or Order 44A of the Rules of the Supreme Court.

An argument was canvassed by counsel for the Plaintiff that this application is misplaced as no notice of intention to defend has been filed, nor is there a conditional memorandum of appearance. I agree with counsel for the Defendant that this requirement would only apply in instances where the irregularity of the writ itself is alleged; not where a party's *locus standi* is impugned as such an irregularity is not curable (See Order 2, rule 1 of the Rules of the Supreme Court quoted at page 8 above). For this reason, it is my firm view that while the **Wynter M. Kabimba** case is good law, it does not apply to the circumstances of this case.

In the final analysis, I conclude that the Defendant's preliminary issue has merit. The upshot of this conclusion is that the entire action herein is dismissed with costs to be personally borne by the shareholders and directors



of the Plaintiff company.

**DELIVERED THIS 29<sup>TH</sup> DAY OF JUNE 2015**



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**C. KAJIMANGA  
JUDGE**