

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)

2014/HP/1859

IN THE MATTER OF : **THE REMAINING EXTENT OF FARM**
 No. 396a/A/3/22

BETWEEN:

LINDSAY GORDON PEARCE
(Suing as Executor of the Estate of Johannes
Hendrix Young)

APPLICANT

AND



JOHANNES DANIEL YOUNG

RESPONDENT

Before Hon. Mrs. Justice A. M. Sitali in chambers on the 10th day of June 2015

For the Applicant **:** ***Mr. T. Chali of***
 Messrs H.H. Ndhlovu and Company

For the Respondent **:** ***Miss Theotis of***
 Messrs Theotis Mataka and Sampa

R U L I N G

Cases Referred to:

1. Shilling Bod Zinka v. The Attorney General (1990-92) ZR 73
2. Bellamano v. Ligure Lombardo Limited (1976) ZR 267

Legislation Referred to:

1. The High Court Rules, Cap. 27 of the Laws of Zambia Order v. rules 14, 16 and 20 (b).

The applicant commenced this action by originating summons supported by affidavit deposed to by the applicant on 21st November, 2014. On 15th December, 2014, the respondent filed an affidavit in opposition. On 4th May, 2015 the applicant filed summons to change the mode of commencement of the action. The summons is supported by an affidavit deposed to by Mwiche Ntinda. The summons are filed pursuant to Order 28/8/4 as read with Order 32 rule 19 (19) of the Rules of the Supreme Court, 1999 edition (the White Book).

On 18th May 2015 the defendant filed a notice of intention to raise preliminary issue pursuant to order 33 Rule 3 and 7 of the White Book. The first issue which the respondent wishes to be determined is whether or not the plaintiff's affidavit in support of the application is properly before the Court as the deponent of the affidavit is not the plaintiff herein and has not disclosed the capacity in which she has sworn the affidavit. The second issue raised is whether the application is properly before the Court as the provisions that the plaintiff has relied on in making this application do not relate to changing the mode of commencement and the application is therefore based on the wrong provisions of the law.

At the hearing of the application, Miss Theotis, counsel for the defendant submitted that the application filed by the plaintiff is incompetently before the Court because firstly the affidavit in support is defective as it has been sworn by one Mwiche Ntinda who is not a party to this action. Counsel submitted that the deponent has not stated in what

capacity she has sworn the affidavit nor has she stated her trade or profession, her residential address or her nationality as stipulated by Order V rule 20 (b) of the High Court Rules.

Miss Theotis further submitted that the affidavit is also not compliant with Order V rule 16 of the High Court Rules in that the deponent has not stated whether the facts stated in the affidavit are within her own knowledge or how she has come to have such information.

With regard to the second preliminary issue, counsel submitted that the application is improperly before the Court as it is based on wrong provisions of the law, that is, Order 28 of the White Book, which does not provide for changing the mode of commencement of an action. Counsel submitted that Order 28 rule 4 gives the Court power to order that a matter commenced by originating summons will proceed as though commenced by writ and that it does not provide for changing mode of commencement. Miss Theotis further submitted that Order 32 of the white book to the best of her knowledge does not contain sub rule 19 and 20. Counsel thus prayed that the application be dismissed with costs for being improperly before this court.

In opposing the application Mr Chali counsel for the plaintiff, conceded with regard to the first issue raised that the deponent ought to have stated the capacity in which she deposed to the affidavit and that she should have stated the residential address and

other information in terms of Order V rule 20 (b) of the High Court Rules. Counsel submitted that the defect in the affidavit in support is not fatal to the application but is curable.

With regard to the second preliminary issue raised Mr. Chali submitted that it is trite that the law exists regarding the change of mode of commencement of an action or which empowers the Court to order that a matter commenced by originating summons proceeds as though commenced by writ of summons. Counsel submitted that this power is inherent in the Court and can be exercised on the Court's own motion or on application by a party. Counsel argued that the citation of the wrong provision of the law if any is not fatal but is curable. He cited the case of Zinka v. Attorney General (1) in support.

In reply, Miss Theotis drew my attention to Practice Direction No. 1 of 2002 and submitted that the practice direction makes it mandatory that the correct provision of the law pursuant to which the application is made must be cited when making an application before the Court and that where this is not done, the application should not be entertained. Counsel cited the case of Bellamano v. Ligure Lombarda Limited (2) with regard to the affidavit and maintained that it is irregular and should be struck out.

I have considered the application before me as well as the submissions made by learned counsel for the respective parties.

The defendant seeks to have the plaintiff's application to change the mode of commencement of this action dismissed on the ground that the affidavit in support of the application is defective. Counsel for the plaintiff conceded that the affidavit is defective to the extent that it does not comply with the provisions of Order 5 rules 16 and Order 5 rule 20 (b) of the High Court Rules. That notwithstanding Order 5 rule 14 provides that:

"A defective or erroneous affidavit may be amended and re-sworn, by leave of the Court or a Judge, on such terms as to time, costs or otherwise as seem reasonable."

Thus as counsel for the plaintiff submitted although the affidavit is defective, the defect is curable and the application cannot be dismissed merely on the basis that the said affidavit is defective. Thus the first preliminary issue raised is dismissed.

With regard to the second preliminary issue raised it is trite that it is always necessary on the making of applications for the summons or notice of application to contain a reference to the order or rule number or other authority under which the relief is sought. In the present case, the summons does state a provision under which the application to change the mode of commencement is made. However Counsel contends that the provision cited is wrong. I should state that the wrong citation of the provision of the law under which the application is made is not the basis on which an

application can be dismissed as long as the power to grant the relief sought is appropriately provided for in the rules. In the instant case Order 28 rule 8 of the RSC, 1999 edition gives power to the Court at any stage of the proceedings to order that a cause or matter begun by originating summons be continued as if the cause or matter had been begun by writ and may order that any affidavits filed in the cause should stand as pleadings with liberty to any of the parties to add to the said affidavits or apply for particulars thereof. That being the case, although the summons were filed pursuant to Order 28 rule 8 of the RSC, 1999 edition, the said application can be entertained as the summons do make reference to the law under which the Court has the power to grant the application sought.

As the affidavit in support of the application is defective I would ordinarily have granted leave for the said affidavit to be amended and re-sworn. But given that I have the power to order that the proceedings herein which were commenced by originating summons should proceed as though commenced by writ, that is the route I will take as it will expedite the determination of the matter. I, therefore dismiss the second preliminary issue raised and accordingly order that the proceedings herein though commenced by originating summons will proceed as though commenced by writ in accordance with Order 28 rule 8 of the White Book as the contentious issues raised in the affidavit filed by the parties cannot be determined by affidavit evidence only.

The affidavits filed herein will stand as pleadings and either party is at liberty to add to the said affidavits.

The costs relating to this application will be costs in the cause.

Leave to appeal is granted.

Dated this 10th day of June, 2015



A. M. SITALI
JUDGE