

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

2014/HP/1350

BETWEEN:

TOM STEPHEN PHIRI
PETER TIMEYO NKOSI



1ST PLAINTIFF

2ND PLAINTIFF

AND

CHRISTOPHER LUBASI MUNDIA

DEFENDANT

Coram: Honourable Mr. Justice Mubanga M. Kondolo, SC

For the 1st and 2nd Plaintiff: Messrs MK Achume and Associates

For the Defendant: Mr. C. L. Mundia, SC - Messrs C L Mundia and Company

R U L I N G

LEGISLATION & TEXT

1. The High Court Act, Chapter 27, Laws of Zambia
2. The Supreme Court Practice (White Book), 1999 Edition
3. The Limitation Act 1939 (England)
4. Halsbury's Laws of England, 4th Edition Vol. 28

CASES

1. In The Matter of The Legal Practitioners Act, CAP 30 AND In the Matter of The Legal Practitioners (Costs) Order, 2001 AND In The Matter of The Legal Practitioners Committee of The Law Association Of Zambia.

2. **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceutical Limited 1995/1997 ZR 187**
3. **Sheldon v RHM Outwaite (1995) ALL ER 558**
4. **Mukumba and Others v Nkwilimba and Others SCJ No. 8 of 2003**
5. **Boniface Sakala v Zambia Telecommunications Company Limited, 2010/HP/0727 (Unreported)**

This is an Appeal against a Ruling on Preliminary Issues by the Deputy Registrar dated 23rd December, 2014.

The background to this Appeal is that the Respondents had earlier commenced separate actions¹ against Zambia National Building Society and the Appellant represented the Respondents in those matters.

The Respondents commenced the matter now before court by a Writ of Summons dated 28th August, 2014. They allege that when representing them against Zambia National Building Society, the Appellant entered into Consent Judgments in the said two causes without their consent and they only became aware of the said Consent Judgments after 2011.

They further allege that the Consent Judgments provided for the payment of costs and that Zambia National Building Society had confirmed that costs were paid. The Respondents now seek a refund of legal fees allegedly overpaid to the Appellant plus interest and costs.

The Appellant reacted by filing a Notice of Motion to Raise Preliminary Issues of Law² which motion was heard by the Deputy Registrar. He raised the following preliminary issues;

1. *That the claims by the Plaintiffs are Statute barred pursuant to Law Reform (Limitation of Actions) Cap 72 of the Laws;*

¹Cause No's. 2007/HP/1283 and 2008/HP/0112

²Notice of Motion to Raise Preliminary Issues of Law

2. *The action herein is incompetent as it is an abuse of Court process and amounts to multiplicity of actions;*
3. *That the Defendant has been wrongly cited as the right party should have been CL Mundia and Company sued as a firm and not the individual Partner.*

In her Ruling, the learned Deputy Registrar ruled as follows:

1. *The matter could not be dismissed on account of being Statute barred but that it needed to proceed to trial for greater consideration;*
2. *There was no multiplicity of actions as the matter was a new cause of action based on fresh facts; and*
3. *That citing an incorrect Party was a curable defect and could be amended to show the correct party being 'C L Mundia and Company sued as a firm'.*

The Appellant appealed against the whole Ruling.

The Appeal came up for hearing on 29th June, 2015. On behalf of the Appellant, State Counsel Mr. Mundia, relied on his submissions filed on 26th June, 2015 and also submitted viva voce. The Respondents were not present but they had filed arguments which I have taken into consideration.

I have separated the Appellants arguments into four separate grounds and I shall address each ground separately.

Ground One

The first ground of appeal was that the Lower Court ignored the Ruling of Justice Nyangulu in the matter entitled **In The Matter of the Legal Practitioners Act, CAP 30 AND In The Matter of**

the Legal Practitioners (Costs) Order, 2001 AND In The Matter of the Legal Practitioners Committee of the Law Association of Zambia. In that matter Judge Nyangulu ruled that client sare not entitled to costs awarded in Court. Mr. Mundia, SC pointed out that the Plaintiffs were claiming that they were entitled to the costs awarded in the Consent Judgments when in fact not. He submitted that the Deputy Registrar was bound by the principal of *stare decisis* whereby subordinate courts are bound by the decisions of superior courts.

The Deputy Registrar on page R4 set out what she understood the Respondents were claiming with regard to the costs as follows;

“It was the Plaintiffs further averment that they consented to the deductions of costs in ignorance of the true facts, namely that the Defendant had also been paid by the Building Society. In conclusion, the Plaintiffs stated that this is a new cause of action based on the fact that the Defendant has unjustly benefited by being paid twice.”

The Respondents are not claiming that they are entitled to costs but are claiming “legal fee’s overpaid”. Paragraphs 7 and 10 of the Statement of Claim indicate that the Plaintiffs seek relief against what they perceived as unjust enrichment by the Appellant receiving payment from both Zambia National Building Society and from the Respondents. This is a matter for evidence and legal arguments at trial and quite different from the circumstances addressed in the ruling of Nyangulu, J³. This ground of appeal is dismissed.

Ground Two

In ground two Mr. Mundia SC submitted that the Deputy Registrar misunderstood and/or misdirected herself with regard to his claim that there existed a multiplicity of actions and therefore an abuse of the Court process by the Respondents. He argued that the Respondents

³ *Supra*

should have brought their claims individually under the two causes of action, namely, 2007/HP/1283 and 2008/HP/0112 because the claims for costs emanated directly from those actions. He augmented his argument by referring to the case of **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceutical Limited**⁴ in which it was held that the Court disapproves of the commencement of a multiplicity of actions over the same matter.

The Respondents agreed that common questions of law or facts and rights of relief arising out of the same transaction should be consolidated in one action and cited the case of **Mukumba and Others v Nkwilimba and Others**⁵ which complements the case cited by the learned State Counsel. They argued, however, that this was a fresh action based on facts and issues common between the Parties herein.

The dispute between the Appellant and the Respondents herein emanates from the Consent Judgments signed between Zambia National Building Society and the Appellant as Counsel for the Respondents⁶. This action, the subject of this appeal (**Cause No. 2014/HP/1350**), is between the Appellant and the Respondents who, *vis-à-vis* the Consent Judgments, were one and the same party i.e. the Respondents and their counsel (the Appellant). Zambia National Building Society is not involved. The Parties to this action and the nature of the dispute are quite different from the actions that gave rise to the Consent Judgments. The learned Deputy Registrar was on firm ground to reject the argument that there was a multiplicity of actions and an abuse of the court process. This ground is dismissed.

Ground Three

The Appellant further argued that this action is statute barred because, as the record shows, the first payments to the Respondents were made over 6 years before the commencement of this action.

⁴ *Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceutical Limited* 1995/1997 ZR 187

⁵ *Mukumba and Others v Nkwilimba and Others* SCJ No. 8 of 2003

⁶ *Cause No's. 2007/HP/1283 and 2008/HP/0112*

The Respondents replied by saying that the Appellant concealed the fact that he had executed Consent Judgments with Zambia National Building Society and that the cause of action *in casu* emanated from the said Consent Judgments. They averred that they only became aware of the Consent Judgments after 2011 and argued that the limitation period only started running after they became aware of them, meaning that this action was filed within the limitation period.

According to the record the Appellant filed the consent judgments sometime in September, 2008. The claims herein are in relation to the said Consent judgments and the limitation period would in that case, at the earliest, begin running in September, 2008.

Section 2 of the **Limitation Act 1939**⁷, provides as follows:

"2 (1) the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:-
a) *actions founded under on simple contract or on tort.....*

(4) an action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable..."

(Underlining mine)

This not being a matter arising from a simple contract or tort but being a matter arising from a consent judgment the applicable provision of the Limitation Act is Section 2(4) which provides for a limitation period of 12 years. This matter would only fall outside the limitation period after 2020.

On account of the foregoing, I agree with the learned District Registrar that this matter is not statute barred.

⁷*Limitation Act 1939 (England)*

Ground Four

The fourth ground of appeal arose from the fact that instead of commencing this matter against the Appellants firm, the Respondents had commenced the action against him in his individual capacity. He argued that after accepting that the Respondents had wrongly cited him as a party, the Deputy Registrar erred when she substituted the Parties by removing him as a Party and replacing him with his firm. He submitted that the Respondents had offended **Order XIV Rule 7**, and the learned Deputy Registrar should not have substituted the Parties without the Respondents providing very good reasons.

The learned State Counsel cited **Order 14 Rule 7, HCR**⁸ as the authority that the law requires that the firm and not individual partners be sued. The Order reads as follows;

Order 14 Rule 7 - Proceedings by or against partners

“Any persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms (if any); and any party to an action may, in such case, apply to the Court or a Judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner and verified on oath or otherwise as the Court or a Judge may direct.”

The cited law uses the word “may” which means that it is not a mandatory provision. The rule simply provides the option for co-partners to sue or be sued in the name of their respective firms.

Secondly, this particular provision only applies to partnerships. It is not clear whether the subject firm is a one man firm or a partnership.

Finally, the cited law does not state that proprietors of firms cannot be sued as individuals and provides no hint of limited liability such as that enjoyed by shareholders of companies registered under the **Companies Act**⁹.

⁸Order 14 Rule 7, High Court Rules, high court Act, Chapter 27, Laws of Zambia

Notwithstanding the above, there was nothing wrong with the Deputy Registrar having substituted the Parties because **Order 18, HCR¹⁰** empowers the Court to amend any proceedings, at any stage so as to determine the real question or questions in controversy between the Parties. The amendment will result in no prejudice against the Appellant and this ground of appeal is consequently dismissed.

The learned Deputy Registrar was on firm ground and this Appeal is hereby dismissed and costs are awarded to the Respondents.

Dated the 13th day of January, 2016

A handwritten signature in blue ink, consisting of several fluid, overlapping strokes, positioned above a horizontal dotted line.

M.M.KONDOLO, SC

JUDGE

⁹*The Companies Act, Chapter 388 of the Laws of Zambia*

¹⁰*Order 18, High Court Rules, High court Act, Chapter 27, Laws of Zambia*