

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

2017/HP/0150



BETWEEN:

LAMASAT INTERNATIONAL LTD

PLAINTIFF

AND

FINANCE BANK ZAMBIA LTD

DEFENDANT

BEFORE HONORABLE MR. JUSTICE MWILA CHITABO, SC

*For the Plaintiff: Mr. B.C Mutale, SC with Mr. Kennedy Kaunda
of Messrs Ellis & Co.*

*For the Defendant: Ms. Mwape Bwalya with Joshua Kabwe and
Alfred Mumba of Messrs Mwenye & Mwitwa
Advocates*

R U L I N G

Cases referred to:

- 1. Development Bank of Zambia and KPMG Peat Marwick v.
Sunvest and Sun Pharmaceuticals Limited (1977) SJ 10 (SC)*
- 2. C & B Enterprises Limited v. LIEGE Zambia Limited
2015/HP/1669*

3. *Attorney General v. Dora Siliya (femme sole) and 2 others*
Judgment No.17 of 2015, appeal No. 2008/2013
4. *Winnie Zaloumis (suing in his capacity as the Acting National Secretary for MDD) v. Felix Mutati and 3 others selected*
Judgment No 28 of 2016 SCZ/8/156/2016, Appeal No. 106/2016

Legislation referred to:

1. *High Court Rules Chapter 27 of the Laws of Zambia*
2. *Supreme Court Rules of England, 1999 Edition White Book*

This is an application for transfer of the matter from the General list to Commercial list anchored on Order 53 Rule 11 (1) of the High Court Rules¹ on the ground that

(1) *The pleadings and documents filed by the parties reveal that the issues in dispute arose from a commercial transaction.*

(2) *That in accordance with order 53(5) (i) of the High Court Rules¹, it is mandatory for every commercial action to be commenced and filed in the commercial list.*

The application is supported by an affidavit deposed to by one Charity Nsunge Shitumbanuma a Head of credit for the defendant (by original action) the essence of which is that the plaintiff launched proceedings by mode of writ of summons and statement of claim against the defendant on 31st January, 2017 wherein *inter alia* prayed for an order to vary or restructure the settlement terms

of a loan facility and an order directing the plaintiff to pay the overdraft facility arrears in installments.

It was deposed that on 1st March, 2017 the Plaintiff filed an amended writ of summons and statement of claim wherein the plaintiff made additional claims for damages for

- (i) *Lack of good faith damages*
- (ii) *Defamation*
- (iii) *Loss of opportunity, and*
- (iv) *Loss of chance as a result of the defendant's negligence, lack of good faith and breach of duty of care.*

That on 2nd March, 2017 the defendant filed its defence and counterclaim against the Plaintiff claiming *interalia* payment of a sum of US\$229, 065.63 plus contractual interest and damages for breach of contract due under the Term Loan Facility.

It was further deposed that on 11th April, 2016 the parties executed a Term Loan Facility for purposes of consolidating existing credit facilities in the Defendants books into a single loan of US\$10, 000,000 and to settle an outstanding balance of US\$3, 408, 624.65.

It was deposed that the transactions reveal that the issues upon which the plaintiffs claims and counterclaims are prompted arose from a commercial transaction and therefore commercial in nature and on the advise rendered by their Advocates the action ought to have been commenced by the Plaintiff in the commercial list registry of the High Court.

It was therefore in conclusion deposed that in the circumstances the action ought to be transferred to the commercial list.

The application was opposed by one **Mohamed Ahmed** the Chairman of the Plaintiff Company and also the 3rd Defendant to the counterclaim. The gravamen of which was that on the advise rendered to the Plaintiff by their Advocates, the Plaintiff has a discretion to launch proceedings either before the principal registry (General List) or before the commercial Registry.

It was deposed that the defence and counterclaim inter alia sought for orders for:-

- (i) Foreclosure on an order for the sale of subdivision 'N' of subdivision D of Farm No. 397 A, Lusaka in the Republic of Zambia;
- (ii) Foreclosure on and an order for sale of subdivision 1 of subdivision No. 397 a, Lusaka in the Republic of Zambia;
- (iii) Foreclosure on and an order for the subdivision O of subdivision D of Farm No. 397a, Lusaka in the Republic of Zambia which claims according to his attorneys are correctly before the High Court at the Principal Registry.

It was finally deposed that the amended writ of summons aforementioned contains claims in nature and no cause has been shown why the cause should be transferred to the commercial list.

The Plaintiff also filed in skeleton arguments in opposition to the Defendants application. The essence of which was that whilst Order 53 Rule (1) of the High Court Rules establishes the commercial list registry, it was submitted that it is not mandatory to commence or continue a commercial matter in the commercial registry. It was further submitted that whilst Order 53 Rules 5 of the said rules provides that:-

“A commercial action shall be commenced and filed in the Registry” Rule 11 (1) however states as follows:-

“A party to an action may at any stage prior to the reschedulement conference apply to a Judge for the transfer of the action to or out of the commercial list”

It was pointed out that the use of the word “May” confirms that where a matter of a commercial nature is filed in the General list, it is not mandatory to file or transfer it to the Commercial list registry.

It was further pointed out whether of a commercial nature or not, a matter can be transferred out of the commercial list registry.

It was submitted that not all the claims in the amended writ of summons are of commercial nature, but include damages for defamation, negligence and breach of statutory duty amongst others premised on the common law of tortious liability and accordingly, the commercial court has no jurisdiction to hear matters other than commercial matters.

It was submitted that this Court has jurisdiction to hear both commercial and non commercial matters, pointing out that since the commercial court has no jurisdiction on non commercial claims, it is in the interest of justice that all claims herein are determined by one Court, this Court. In support of this proposition reliance was placed on the case of **Development Bank of Zambia and KPMG Peat Marwick v. Sunvest Limited and Sun Pharmaceuticals¹**, where it was held that:-

“.....the Court does not approve of commencement of a multiplicity of procedures, proceedings and actions in different Courts which may result in the Courts making contradictory decisions on the same matter”

On the basis of the foregoing, it was submitted that the Defendants application be dismissed.

At the hearing, Learned Ms. Mwape Bwalya made oral submissions. She indicated that she relied on the supporting affidavit. The gravamen of which was that the disputes that have arisen between the parties was a commercial nature and ought to be transferred to the commercial list pursuant to the enabling provisions of Order 53 Rule 1.

She pointed out that Order 53 Rule 2 (2) provides for the commercial actions to be prosecuted in accordance with the rules as established pursuant to Order 53 Rule 2 (1) which establishes the commercial list.

Learned Counsel Bwalya then called in aid the case of C & B Enterprises Ltd v. Leige (Zambia) Limited ², where my brother Mchenga SC, J (as he then was) wherein he pronounced that:-

“A commercial action being or falling under a commercial transaction shall be commenced in accordance with the commercial rules”

It was pointed out the establishment of the commercial list was established as a reaction to the business community’s concerns about length of time it took to dispose of business disputes in the High Court that had the effect of litigants suffering financial ruin.

It was her submission that a reading of Order 53 does not prohibit the commercial Court to deal with other actions that may not be commercial in nature, which arose out of a commercial transaction.

In respect of the available summary procedure in the High Court, it was her submission that better purpose will be served by transferring the matter to the commercial list which is the appropriate forum the action under dispute.

The Learned State Counsel Mr. B.C Mutale opposed the application and under his watchful eye deferred full argument to Learned Counsel Kennedy Kaunda.

In opposing the application, Learned Counsel relied on the opposing affidavit and also on the skeleton arguments which I will not

replicate on account of brevity and I will only highlight those aspects not captured in the affidavit and skeleton arguments.

The gravamen of which was that a reading of Order 11 (1) shows that it was not the intention of the legislature that all commercial transactions having a merger with other multiple claims though arising out of some transactions ought to be only be heard by the Commercial Court or that they ought to be transferred.

Turning to the case of **C & B Enterprises Limited v. Liege**, Learned Counsel pointed out that the authority made no reference to rule 11 (1) and as such was decided per in curiam and he discouraged me not to follow that decision. In any event, he argued I was not bound to follow the previous decision.

I am indebted on the submissions of the Learned Attorneys.

The starting point in resolving the transfer application is to look at Order Rule (1) of the High Court Rules. It provides as follows:-

“There shall be a commercial list in which commercial actions in the Court shall be entered in accordance with these rules.

(2) Every commercial action shall be prosecuted in accordance with these rules.

(3)”

The language of the legislature is precise and need no further investigation to discover the literal intention of the legislature. My

brother Mchenga, J as he then was had occasion to consider the subject in the case of **C & B Enterprises Limited v. Liege Zambia Limited**², he put it this way:-

“From the submissions of both counsel, it is common cause that these proceedings are founded on a commercial transaction. The question for determination is whether it is mandatory that all matters concerning commercial transaction should be commenced on the commercial list.

Rule (2) (2) of Order 53 of the High Court Rules provides as follows:-

‘Every commercial action shall be commenced and filed in accordance with these rules’

In the case of rule 2 (5) Order 53 Rule 2 (5) of the High Court Rules, it provides that:-

‘A commercial action shall be commenced and filed in the Commercial Registry in accordance with Order 53 of the High Court Rules. Consequently, I find that this application has merit because this matter of a commercial nature and should have been filed in the Commercial registry. This matter is therefore transferred to the Commercial list’

It is obvious from the Ruling that the issue of transfer of cases from or to the Commercial list as relates to multiple actions. Rule 11 of Order 53 of the High Court Rules was not discussed in the Ruling

on which the Defendants heavily relied upon. I therefore agree with the submissions of the Learned Mr. Kaunda that the said ruling was decided per in curiam and in any case the issue of multiple claims was not an issue in the Ruling and as such is of little or no help at all to the Defendants.

Order 11 (2) provides as follows:-

“a party to an action may at any stage prior to the rescheduling conference apply to a Judge for the transfer of the action to or out of the commercial list”

It was submitted by the Learned Counsel for the defendant Mr. Kabwe and Ms Mwape that once the matter is demonstrated to be commercial irrespective as to whether there are multiple claims, it was mandatory to transfer a cause filed in the principle registry to the commercial list.

With respect to counsel, the words of the legislature employed in the filing or transfer of a matter of commercial nature is “May” and not “Shall”. To argue that the filing or transfer of a matter from or to the commercial list is doing violence to the word “May”.

The Court of last resort, the Supreme Court had occasion to pronounce itself on the duty of Judges to apply the will of the legislature. This was in the case of ***Attorney General v. Dora Siliya (femme sole) and 2 Others***³, where his Lordship DCJ Mervin Sitwala Mwanamwambwa reading the Judgment of the

Court instructively and authoritatively crafted it in the following fashion and style:-

“In the field of statute law, the Judge must be obedient to the will of Parliament as expressed in its enactment. In this field, Parliament makes and unmakes the law and the Judges duty is to interpret and apply the law, not to change it to meet the Judge’s idea of what justice requires. If the result be unjust or inevitable, the Judge may say so and invite Parliament to consider the position. But he may not deny the statute, unpalatable statute may not be disregarded or rejected merely because it is unpalatable.

See *Duport Steels Ltd v. Sirs* [1980] 1 WLR 148 and 168

Lord Denning is of the same view. In ***Deeble v. Robinson*** (1953) 2 All ER at page 1357 he said

‘When parliament is specific we are not at liberty to depart from it’

*Further to give effect to the subject or purpose of statute, all provisions bearing on a particular subject ought to be brought into view and interpreted together. See (a) *State v. State v. Petrus and another* [1956] LRC (b) *Rafliu Rabiuv v. S* 1981 2 NCLR 293 (C), *South Dakota v. North v. North Carolina* (1940) 192 USA 268 48 ED at P. 465”*

By doctrine of stare decisis my hands are shackled and I have to retrace and walk the path taken by the Court of last resort of the realm.

Further, the very fact that Rule 11 provides for discretion to file or apply for a transfer of an action from or to the commercial list is sufficient anchor to hold as I hold that in appropriate cases, I should hasten to add like the case in casu where there are multiple tortious claims interalia though originally arising from a commercial transaction, there are cases which may not be fit for transfer of a cause or action to the commercial list.

The Commercial Court has mandate and jurisdiction to hear and determine actions of a Commercial matter. The High Court General list has unlimited though not limitless jurisdiction to hear claims of all nature subject of course to other relevant statutory provisions.

Segregating the commercial claims to be tried in the Commercial list and the tortious claims and other claims to be heard in the General list will bring absurdity to the judicial system as there is definite potential danger of courts of equal jurisdiction reaching upon conflicting decisions on the subject matter wherein issues are intertwined and ought to be dealt with wholistically in one action to avoid multiplicity of actions that is frowned upon by the courts.

The Court of last resort had occasion to pronounce itself on the issue of multiplicity. This was in the case of ***Development Bank of***

Zambia and PKM Peat Marwick v. Sunvest Limited and Sun Pharmaceuticals Limited wherein the Court held:-

“and the Court does not approve of the commencement of a multiplicity of procedures, proceedings and actions in different Courts which may result in Courts making contradictory decisions on the same matter”

It was submitted by the Learned Counsel for the Defendants' that justice will swiftly be administered by transferring the matter to the Commercial list as the matter is likely to be dealt with expediently away from the lengthy procedures in the General list and further that Commercial Court once seized of the matter will have jurisdiction to deal with the non commercial claims since they arise from a commercial.

This was countered by the Learned Counsel for the Plaintiff who pointed out that even in the High Court Principal Registry, General list there is summary procedure. It was further pointed out that Order 53 does not give jurisdiction to Commercial Court to deal with matters other than commercial matters.

There is force in the submissions by the learned Counsel for the Plaintiff. I have already in one or two of the preceding paragraphs alluded to the fact in a fit and proper case, the High Court General list has jurisdiction to hear commercial actions which are intertwined with other multiple claims.

I have combed the provisions of Order 53 and have not found any provision or rule that proscribes the Judge on the general list to deal with commercial actions intertwined with other multiple claims.

In respect of expedient disposition of the case on the general list, the Court of last resort had occasion to pronounce itself on the matter.

To that extent, I visited the case of **Winnie Zaloumis (suing in her capacity as the Acting National Secretary for MMD) v. Felix Mutati and 3 others** ⁴, Kaoma, JS had this to say at page J27:-

*“The alternative course the learned High Court Judge could have taken in view of the urgency of the matter was to order an early trial in accordance with **Order 29 Rule 5 of the White Book**.³ The said order provides as follows:-*

‘where on the hearing of an application made before the trial of a cause or matter, for an injunction or the appointment of a receiver under Order 2, 3 or 4 it appears to the Court that matter can be better dealt with by an early trial than by considering the whole merits thereof for the purposes of the application, the Court may make an order accordingly and may also make order as respects the period of trial as the justice of the case may be..... our view that the procedure in the order cited above was appropriate in the matter before the learned

High Court Judge is confirmed by the fact that the relief which was being sought in the application for an injunction was substantially similar to the relief in the writ of summons and statement of claim.....

The learned High Court Judge in invoking the said order could have given directions for an early trial in accordance with Order 29 rule 7 subrule 1 of the White Book which states as follows:

Where an application is made under any of the foregoing provisions as to the further proceedings in the cause of matter'

We are of the firm view that had the learned High Court Judge taken this approach; the matter would have been put to rest with finality"

I am duty bound to follow the instructions of the Court of last resort. In my view this is a fit and proper case utilize and invoke the provisions of Order 29 Rule 7 Sub rule 1 of the white Book,².

On the foregoing, I find that there is no merit in the Defendants transfer application.

Ordinarily costs follow the event. Put differently the successful litigant harvests the fruits of his Judgment or Ruling unless good cause is demonstrated why the same should be denied.

The costs however are in the discretion of the Court. In exercising that discretion the Courts should do so judiciously.

I find no cause to deprive the Plaintiff of the costs. The costs are for the Plaintiff to be paid by the Defendants which costs are to be taxed in default of agreement.

The matter is to come up on 18th May, 2017 at 12:00 hours for issuance of Order for Directions.

Leave to appeal to the Court of Appeal is granted.

Delivered under my hand and seal this ^{18th}..... day of May, 2017



Mwila Chitabo, SC
Judge