

IN THE HIGH COURT FOR ZAMBIA
IN THE COMMERCIAL DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2017/HPC/0050

BETWEEN:

FRED M'MEMBE

AND

INVESTTRUST BANK PLC



PLAINTIFF

DEFENDANT

Before: Hon. Lady Justice Dr. W. S. Mwenda in Chambers on the 10th day of March, 2017.

For the Plaintiff : No Appearance
For the Defendant : Mr. O. Sitimela of Messrs Fraser Associates appearing with Mr. B. Msidi, Defendant's in-house Counsel.

RULING

Cases referred to:

1. *Salomon v. Salomon and Company Limited (1897) A.C. 22.*
2. *Christopher James Thorne v. Christopher Mulenga, Edgar Hamuwele and Zambia National Commercial Bank Plc (2010) Z.R. Vol. 1, p. 221.*
3. *Bank of Zambia v. Aaron Chungu, Access Leasing Limited and Access Financial Services Limited (2008) Z.R. Vol.1, p. 159.*

4. *Development Bank of Zambia and KPMG Peat Marwick v. Sunvest Limited and Sun Pharmaceuticals Limited (1995 – 1997) Z. R. 187.*
5. *Kelvin Hang'andu and Company (a firm) v. Webby Mulubisha S.C.Z. Judgment No. 39 of 2008.*
6. *Muyawa Liuwa v Attorney General S.C.Z. Judgment No. 38 of 2014.*

Legislation referred to:

1. *Order 18 rule 19 (1) of the Rules of the Supreme Court, 1999 Edition (White Book).*
2. *Order 53 rule 6 (1) of the High Court Rules, Chapter 27 of the Laws of Zambia.*
3. *Section 10 of the High Court Act, Chapter 27 of the Laws of Zambia.*
4. *Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia.*

Publication referred to:

1. *G. H. Treitel The Law of Contract (London: Sweet and Maxwell, 2003) p.588.*

This is an application by the Defendant herein to dismiss the action for being an abuse of court process. The application is made pursuant to Order 18 rule 19 (1) of the Rules of the Supreme Court, 1999 Edition (White Book). The application, by way of Summons and Affidavit in Support thereof, was filed into court on 14th February, 2017.

The brief background to this application is that on 3rd February, 2017 the Plaintiff herein commenced legal action against the Defendant by way of Writ of Summons issued out of the Commercial Registry wherein he claimed the following relief, namely:-

- (i) A declaration that the Consent Order of 27th January, 2017 staying matters in 2016/HPC/518 be set aside;

- (ii) A declaration that all the actions taken by the Defendant in attempting to assign the debt owed to it by Post Newspapers Limited to an entity aligned to Mr. Mosho pursuant to the above mentioned Consent Order in 2016/HPC/518 are null and void for having been done pursuant to a Consent Order signed without the authority of the Plaintiff;
- (iii) A declaration that because the entire winding up process is being challenged for fraud and illegality, which fact the Defendant is fully aware of, it is wrong for the Defendant to act in a manner prejudicial to its customer Post Newspapers Limited who is challenging the said winding up;
- (iv) An Order that to protect Post Newspapers Limited the Plaintiff is entitled to have the debt described above paid by him, satisfied or assigned to him as a shareholder challenging a fraught liquidation for adequate compensation;
- (v) An interim injunction restraining the Defendant from assigning the debt described above to Mr. Mosho or his proxy or otherwise dealing with Mr. Mosho in relation to the Post Newspapers Limited debt;
- (vi) Costs; and
- (vii) Any other equitable remedy the Court may order.

The grounds upon which the Defendant has based its application to dismiss the action for being an abuse of court process are that:-

- (a) It discloses no reasonable cause of action; or
- (b) It is scandalous, frivolous or vexatious; or
- (c) It is otherwise an abuse of the court process.

To buttress the summons, is an Affidavit in Support of Summons to Dismiss Action for Being an Abuse of Court Process sworn by one Isaiah Griffiths Chindumba, the Chief Operating Officer in the Defendant Bank who deposed that from the advice given to him by the Defendant's advocates, which he

verily believed to be true, the originating process herein is essentially an abuse of the court process for reasons which follow.

It is the deponent's contention that a perusal of the Writ of Summons and Statement of Claim reveals that the factual foundation of the Plaintiff's action is premised on two other matters, namely, cause numbers 2016/TAT/03/VAT/DT and 2016/HPC/518, which are pending before the Tax Appeals Tribunal and High Court, respectively, under which some rulings and/or orders have been granted which the Plaintiff is not satisfied with and therefore, still seeks further redress on the same.

The deponent further avers that the Defendant engaged the Plaintiff as his representative, following the issuance of a Warrant of Distress against the Post Newspapers Limited in or about June, 2016, and advised him that the Defendant considered the action by Zambia Revenue Authority (ZRA) as an event of default pursuant to the facility documents between the Post Newspapers Limited and the Defendant.

In addition, the deponent deposes that on or about 1st November, 2016 under cause number 2016/HPC/518, the Hon. Justice S. B. Nkonde, SC., appointed Lewis Chisanga Mosho of Messrs Lewis Nathan Advocates as Provisional Liquidator of the Post Newspapers Limited as per the Order of Appointment exhibited as "IGC1" in the Affidavit in Support of Summons to Dismiss Action for Being an Abuse of Court Process.

Further, that clauses 6 and 7 of the Deed of Debenture which was registered at the Patents and Companies Registration Agency (PACRA) which created fixed and floating charges over both present and future assets of the Post Newspapers Limited to secure the sum of ZMW11,000,000.00 plus interest, entitled the Defendant to appoint a Receiver to protect its interest as a secured creditor under the said Deed.

Pursuant to the above, the Defendant as debenture holder appointed Mr. Kaongo Musonda of Ventus Legal Practitioners as Receiver of the Post Newspapers Limited, which appointment the Plaintiff did not object to.

Consequent to the appointment of a Receiver, the Defendant was joined to cause number 2016/HPC/518 at the instance of Petitioners under that cause who proceeded to obtain *ex-parte*, an order staying the appointment of the Receiver over the assets of the Post Newspapers Limited and compelling the Defendant herein to hand over all security and documents of title of the Post Newspapers Limited held or managed by the Defendant, pending an application to quash the appointment of the Receiver. The *ex-parte* Order of Stay was returnable on 9th February, 2017. On 24th January, 2017, the Defendant obtained an *ex-parte* order staying execution of the order obtained by the Petitioners referred to above, pending an application to set aside and/or vary the said order. The said applications were made returnable *inter-partes*, on the 6th and 9th February, 2017, respectively.

The deponent asserts further that the Defendant, on or about 27th January, 2017 also applied *ex-parte*, under the liquidation proceedings, for a stay of execution of the ruling joining the Defendant to the said liquidation proceedings pending an application for leave to appeal, which application had not been heard or given *inter-partes* return dates in the alternative, as at the date of swearing the affidavit.

The deponent contends that the Defendant herein is and has always been interested in recovering what is due to it from the Post Newspapers Limited and consequently, engaged the Provisional Liquidator to explore the best way though which the Defendant could recover its money.

According to the deponent, the parties to the liquidation proceedings agreed that whilst the *ex-curia* negotiations were going on, the flurry of applications be adjourned *sine die* pending the said possible amicable settlement but that the applications were to proceed to be heard on the merits in the event that the parties did not amicably conclude the negotiations by 14th February, 2017. That as far as is known to the Defendant, other than giving notice to the Petitioners under cause number 2016/HPC/518, the Plaintiff has not been joined as a party to the winding up proceedings nor has he made any such application for joinder.

Further, that in pursuance of an amicable settlement to recover its money under the facility documents, the Defendant has since opted to assign and/or transfer the outstanding amounts to a third party, namely, Unapologetic Trading (Pty) Limited by Deed of Assignment of Debt dated 31st January, 2017 by virtue of clause 16.1 of the General Terms and Conditions Relating to the Loan Facility it granted to the Post Newspapers Limited.

The deponent avers that it is clear that all the facility documents relating to the debt owed were entered into between the Post Newspapers Limited and the Defendant and as such, any contractual rights and/or obligations derived therefrom can only be exercised by the parties to the facility documents. He contends that in any event, neither the Consent Order under the winding-up proceedings nor the assignment of the debt preclude the Plaintiff herein from challenging the petition under the liquidation proceedings or paying the amount outstanding to the assignee, Unapologetic Trading (Pty) Limited.

The deponent avers that as the Court record will show, the Plaintiff herein is seeking a final relief to set aside the Consent Order entered into under the winding up proceedings which Consent Order the Plaintiff is not a party to. He asserts that he has been advised and verily believes the same to be true, that the Plaintiff's conduct herein amounts to "forum shopping" as by the Plaintiff's own admission he has indicated in his Statement of Claim that he made an application under the winding up proceedings to set aside the appointment of Provisional Liquidator granted therein.

That in light of the foregoing, it is clearly discernible that the Plaintiff through this action and/or relief, is subtly attempting to defeat or negate the court rulings or orders under the winding up proceedings and that as such, the Plaintiff's conduct is plainly an abuse of the court process.

The Plaintiff did not file any documents in opposition to this application. The application first came up for hearing on 27th February, 2017. However, Counsel for the Plaintiff applied for an adjournment to 1st March, 2017 on the ground that he did not have instructions from his client to facilitate the preparation and filing of an Affidavit in Opposition. This Court granted the

adjournment notwithstanding an objection to the same from the Defendant, but condemned the Plaintiff to a hearing fee of K500.00 payable on or before the next hearing date, being 1st March, 2017. The hearing fee was not paid as ordered and neither the Plaintiff nor his Counsel attended the hearing of the application on 1st March, 2017.

Mr. Sitimela, learned Counsel for the Defendant, submitted at the hearing that they had endeavoured in the Skeleton Arguments filed in support of the application to show to this Court that each of the five claims by the Plaintiff as they appear on the Writ of Summons and Statement of Claim, cannot be sustained. Counsel proceeded to give a summary of the arguments raised in the Skeleton Arguments filed in support of the application and the authorities that augment the arguments.

It was Counsel's submission that the authority pursuant to which this application is brought before Court gives three grounds which once established, enables the Court to exercise its power to dismiss a matter. These three grounds are:-

- (i) that the matter discloses no reasonable cause of action; or
- (ii) that the matter is scandalous, frivolous or vexatious; or
- (iii) that the matter is otherwise an abuse of the court process.

It was Counsel's considered view that from the facts relied upon and authorities cited, the Defendant has established, on a preponderance of probabilities, the existence of the three conditions enumerated above. Counsel further urged the Court to dismiss the action with costs in accordance with the guidance from the Supreme Court decisions before Court in order to deter others from contemplating similar abuses of the court process.

Order 18 rule 19 (1) under which the application before this Court has been brought provides as follows:-

"19-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in

the action, or anything in any pleading or in the endorsement, on the ground that -

(a) It discloses no reasonable cause of action or defence, as the case may be; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the Court; and

may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

It is opportune at this juncture, to point out that Order 53 rule 6 (1) of the High Court Rules, Chapter 27 of the Laws of Zambia also has a somewhat similar provision which gives the Court power to strike out, set aside or dismiss an action either on its own motion or on application by a party, if a statement of claim does not show a clear cause of action. The rule states as follows:

“6.1 A statement of claim or counter-claim, as the case may be, shall state in clear terms the material facts upon which a party relies and shall show a clear cause of action, failing which the statement of claim or counter-claim may be struck out or set aside or the action dismissed by the court, on its own motion or on application by a party.”

This Court has noted that the Defendant has brought the application under Order 18 rule 19 (1) of the Rules of the Supreme Court, and not Order 53 rule 6 (1) of the High Court Rules. However, it is the Court’s view that the application is not invalidated by that fact because the Supreme Court Practice, 1999 (White Book) forms part of our laws as it provides default provisions by virtue of section 10 (1) of the High Court Act. Thus the Defendant has relied on Order 18 rule 9 (1) which provides two additional grounds which if established, and whose existence the Defendant seeks to prove, gives the Court the power to dismiss the action. These are:

- (i) that the matter is scandalous, frivolous or vexatious; or
- (ii) that the matter is otherwise an abuse of the court process.

The Court shall, therefore, consider the Plaintiff's claims as endorsed on the Writ of Summons and Statement of Claim in order to determine whether or not they fit any of the criteria set forth in Order 18 rule 19 (1) of the Rules of the Supreme Court.

- i. A declaration that the Consent Order of 27th January, 2017, staying the matters in 2016/HPC/518 be set aside; and**
- ii. A declaration that all the actions taken by the Defendant in attempting to assign the debt owed to it by Post Newspapers Limited to an entity aligned to Mr. Mosho pursuant to the above-mentioned Consent Order in 2016/HPC/518 are null and void for having been done pursuant to a Consent Order signed without the authority of the Plaintiff.**

By the claim in (i) above, the Plaintiff is asking this Court to give a declaratory order setting aside the Consent Order granted by another Judge of the High Court in cause number 2016/HPC/518. It is on record that cause number 2016/HPC/518 relates to a petition to wind up the Post Newspapers Limited in which company the Plaintiff was a majority shareholder. It is common cause that the Post Newspapers Limited was placed under liquidation following the appointment of one Lewis Chisanga Mosho as Provisional Liquidator. The Defendant herein and the Post Newspapers Limited are both Respondents in cause number 2016/HPC/518.

Closely related to claim (i) above is claim (ii) in which the Plaintiff is asking this Court to declare that the actions taken by the Defendant in attempting to assign the debt owed to it by Post Newspapers Limited to a third party pursuant to the said Consent Order are null and void for having been done pursuant to a Consent Order signed without the authority of the Plaintiff.

It is this Court's view that the law relating to the position of shareholder in relation to a company is very clear. At law a company has a separate legal personality from its shareholders; a position that is well articulated in the

landmark case of *Salomon v. Salomon (1)*. That case firmly upheld the doctrine of corporate personality. Therefore, as a separate legal person, a company can sue and be sued in its own right and can own assets separately from its shareholders.

This position was clearly expounded by this Court in the case of *Christopher James Thorne v. Christopher Mulenga, Edgar Hamuwele and Zambia National Commercial Bank Plc (2)* which was cited by the Defendant herein and which decision I adopt. This Court in the said case decided, *inter alia*, that:-

“No shareholder has any right to any item or property owned by the Company for he has no legal or equitable interest. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.”

Therefore, the Plaintiff herein has no legal or equitable interest in the assets of the Post Newspapers Limited. He was entitled to a share of the profits of the company while it carried on business and is entitled to a share of the surplus assets of the company upon it being wound up. In any event, the Plaintiff was not a party to the Facility documents signed between the Post Newspapers Limited and the Defendant herein, further highlighting the separate corporate identity of the company.

Not being privy to the contract between the Post Newspaper and the Defendant, the Plaintiff neither acquired any rights nor liabilities as an individual or shareholder under the said contract as per the authority cited by Mr. Sitimela which I entirely agree with, namely, *G.H. Treitel on the Law of Contract* at page 588 where it was stated that:-

“There are two aspects of the common law doctrine of privity: (1) no one except a party to a contract can acquire rights under it; (2) and no one except a party can be subjected to liabilities under it.”

It follows from the above that the authority of the Plaintiff was not a precondition to the execution of the Consent Order by the parties to the same and neither was it to the Defendant assigning the debt owed by the Post Newspapers Limited to a third party. What should not be lost sight of is the fact that as a company in liquidation, the Provisional Liquidator's advocates signed the Consent Order on its behalf.

Further, as correctly submitted by Mr. Sitimela, it is trite law that a shareholder has no *locus standi* to maintain an action in his own name for the benefit of a company under liquidation outside the liquidator. The case of *Bank of Zambia v. Aaron Chungu, Access Leasing Limited and Access Financial Services Limited (3)* is instructive in this regard. It therefore, follows that the Plaintiff herein had no *locus standi* to bring an action in his own name for the benefit of the Post Newspapers Limited, a company in liquidation, outside the name of the liquidator.

For the above reasons, I am of the view that claims (i) and (ii) in the endorsement of the Writ of Summons and Statement of Claim do not disclose reasonable causes of action.

(iii) A declaration that because the entire winding up process is being challenged for fraud and illegality, which fact the Defendant is fully aware of, it is wrong for the Defendant to act in a manner prejudicial to its customer Post Newspaper Limited who is challenging the said winding up.

As earlier observed, notwithstanding the challenge to the process, it is a fact that the Post Newspapers Limited is currently under liquidation. A Provisional Liquidator was appointed by court order and the Post Newspaper Limited was placed under liquidation. As stated above, this Court's finding, is that the Plaintiff has no *locus standi* to maintain an action in his own name for the benefit of the Post Newspapers Limited, outside the name of the Liquidator.

It is, therefore, vexatious and an abuse of the process of the court for the Plaintiff, who has no *locus standi*, to commence these proceedings in order to seek a declaratory order to the effect that it is wrong for the Defendant to act in a manner prejudicial to its customer, the Post Newspaper Limited which is challenging its winding up.

By commencing these proceedings, the Plaintiff has duplicated the actions, an occurrence which the law and indeed our courts, frown upon. Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia unequivocally empowers the Court to administer law and equity concurrently and to completely and finally determine all matters in controversy between the parties to actions and avoid all multiplicity of legal proceedings concerning any of such matters.

Further, our Supreme Court left no room for doubt or speculation in the case of *Development Bank of Zambia and Another v. Sunvest Limited and Another (4)* where Ngulube CJ., delivering the judgment of the Court, stated as follows at page 188:

"We have listened to the arguments in this appeal and would like immediately to affirm the judge on his disapproval of the steps taken in this matter whereby one action is pending and some other steps are being pursued. We also disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter. The objection raised by the borrowers in this action to the bank pursuing the remedy of self-redress while an action was pending, applies with equal force to the whole idea of the borrowers commencing a fresh action when there is already one pending in court with the result that various courts may end up making various conflicting and contradicting decisions because the parties have started another action in the Courts. It follows therefore that we disapprove completely of the steps taken by the borrowers in commencing action No. 1995/HN/1394 when they could have made all the applications in the earlier action No. 307... It follows therefore that,

in the considered opinion of this court the justice of the case demands that the parties must raise whatever they wish to raise with the Court in the earlier action No. 307. “

Similarly in the present case, the Plaintiff ought to have challenged the Consent Order or appointment of the Provisional Liquidator and raised any other issue regarding the winding up process of the Post Newspapers Limited under Cause No. 2016/HPC/518 which is still pending in the High Court rather than institute fresh proceedings.

- (iii) An order that to protect Post Newspapers Limited the Plaintiff is entitled to have the debt described above paid by him, satisfied or assigned to him as a shareholder challenging the fraught liquidation for adequate consideration; and*
- (iv) An interim injunction restraining the Defendant from assigning the debt described above to Mr. Mosho or his proxy or otherwise dealing with Mr. Mosho in relation to Post Newspaper Limited debt.*

It is my considered opinion that the claims under (iv) and (v) above do not also disclose any reasonable cause(s) of action for the reason that as a shareholder in the Post Newspapers Limited, the Plaintiff has no *locus standi* to institute these proceedings on behalf of the company outside the name of the Provisional Liquidator, and therefore, cannot establish a clear right of relief in the action.

Further, Mr. Sitimela cannot be faulted for submitting that the Plaintiff has not revealed in his claim what injury or damage he has or will suffer as a result of the Defendant proceeding to legally assign the Post Newspapers Limited's debt to a third party and that the mere fact that the Plaintiff was the majority shareholder in the Post Newspapers Limited does not change the legal position that all rights, interest, properties and assets belong to the Post Newspapers Limited and that no claim can be asserted in relation thereto by anyone, including the company's shareholders.

In sum, I find that all the claims by the Plaintiff do not disclose reasonable causes of action and that they are in effect vexatious and an abuse of the court process. Consequently, I am inclined to strike out the endorsement on the Writ of Summons and the Statement of Claim in this cause pursuant to Order 18 rule 19 (1) of the Supreme Court Rules, 1999 and dismiss the said action with costs to the Defendant to be agreed or taxed in default of agreement.

To underscore the point, I have awarded costs against the Plaintiff as a form of stern condemnation against abuse of the court process by litigants. In this regard I am ably guided by the Supreme Court in the cases *Kelvin Hang'andu and Company (a firm) v. Mulubisha (5) and Muyawa Liuwa v. Attorney General (6)*. In the former case the Supreme Court stated as follows:-

"In the instant case, commencement of proceedings before the Hon. Mr. Justice Musonda, before the Deputy Registrar and before the Subordinate Court all amounted to commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter. We also disapprove and condemn the Plaintiff for this conduct... In the net result, all grounds having been successful, the whole appeal is allowed. The whole ruling, orders and directives appealed against are set aside. However, on account of the conduct of the Plaintiff, we order costs against him to be paid to the Defendant in this Court and in the High Court to be taxed in default of agreement." (emphasis court's).

In the *Muyawa Liuwa* case the Court decided as follows:-

"We must state here that courts should not be used to vent out a litigant's frustrations and desperation. We frown upon the applicant's conduct in this matter. We will conclude by issuing a stern warning to the applicant and other litigants, that there are attendant consequences for persistently abusing the court process in this manner. It was for the

foregoing reasons that we dismissed the motion. This time, we award costs to the Respondent.” (emphasis court’s).

The action is accordingly dismissed with costs to the Defendant to be agreed upon or taxed in default thereof.

Leave to appeal is granted.

Delivered at Lusaka this 10th day of March, 2017



W. S. Mwenda (Dr)
HIGH COURT JUDGE