

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

Jes
2016/HPC/0515

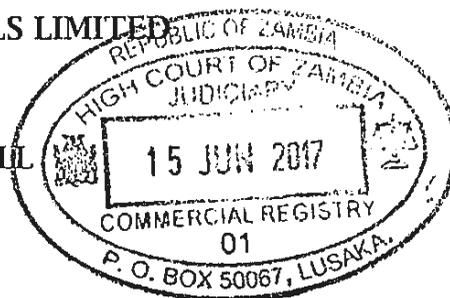
BETWEEN:

ZCCM INVESTMENTS HOLDINGS PLC

PLAINTIFF

AND

FIRST QUANTUM MINERALS LIMITED
FQM FINANCE LIMITED
PHILIP K. R. PASCALL
ARTHUR MATHIAS PASCALL
CLIVE NEWALL
MARTIN R. ROWLEY
KANSANSHI MINING PLC



1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT
6TH DEFENDANT
7TH DEFENDANT

Delivered in Chambers before the Hon. Lady Justice Dr. W. S. Mwenda at Lusaka this 15th day of June, 2017.

For the Plaintiff:

Mr. B. Mutale, SC., of Messrs. Ellis & Company appearing with Dr. J. Mulwila, SC., of Messrs Ituna Partners and Mr. M. Lungu of Messrs Lungu, Simwanza and Company, and In-house Counsel, ZCCM Investments Holdings Plc.

For the 1st Defendant:

Mr. S. Sikota, SC., of Messrs Central Chambers.

For the 2nd Defendant:

Mr. S. Mambwe of Messrs. Mambwe Siwila and Lisimba Advocates.

For the 3rd - 6th Defendants:

Prof. M. P. Mvunga, SC., of Messrs. Mvunga Associates appearing with Mr. D. Jere, also of Mvunga Associates.

For the 7th Defendant:

Mr. S. Chisenga of Messrs Corpus Legal Practitioners appearing with Mr. J. N. Kawana also of Corpus Legal Practitioners.

RULING

Cases referred to:

1. *Law Association of Zambia v Attorney-General and Phillis Lombe Chibesakunda* 2013/HP/1393 (unreported).
2. *Bellamano v Ligure Lombarda Limited* (1976) Z.R. 267 (S.C.)
3. *Josiah Tembo and Another v. Peter Mukuka Chitambala* - 2005/HP/0208 (unreported)

Legislation referred to:

1. Section 85 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia.
2. Rule 33 (1) (d) and (e) of the Legal Practitioners Practice Rules, Statutory Instrument No. 51 of 2002.
3. Rule 3 (2) (a) of the Legal Practitioners Practice Rules, 2002.

This is an application by the Plaintiff herein for an order directing Messrs. Corpus Legal Practitioners, the advocates on record for the 7th Defendant, to recuse themselves from acting in the matter.

The application was filed on 26th May, 2017 by way of a summons and verifying affidavit. The application was made pursuant to Section 85 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia and Rule 33 (1) (d) and (e) of the Legal Practitioners Practice Rules, Statutory Instrument No. 51 of 2002.

The Affidavit in Support of Summons for Order Directing Messrs. Corpus Legal Practitioners to Recuse themselves from Acting in the Matter deposed to by one Lombe Mbalashi an advocate of the High Court of Zambia in the employ of the Plaintiff, discloses that the Plaintiff is a minority shareholder in the 7th Defendant and that from inception of the Plaintiff's shareholding, the Plaintiff has had representation on the 7th Defendant's Board of Directors.

It is the Plaintiff's evidence that on or about 5th December, 2013, the 7th Defendant's Board of Directors conducted a meeting. According to the Minutes of the said meeting, produced and exhibited as exhibit "LM1", a Paper from the Plaintiff regarding inter-company loans was presented to the Board. The salient points being that between 2006 and December, 2012, loans in the sum of US\$1.2 Billion had been availed by the 7th Defendant to the 2nd Defendant without the approval of the Plaintiff, whose approval was required. Further, that the loans and terms the 7th Defendant availed the 2nd Defendant were not approved by the Board. The Minutes further stated that the 7th Defendant's management should provide documentary evidence that the Plaintiff gave consent to the financing arrangements between the 2nd Defendant and the 7th Defendant.

The Minutes further show that the Legal Adviser had stated that there was no prohibition from the legal assessment as there was permission under the arrangement for the terms of these transactions to be tested. The discussion of terms and conditions and not cancellation, was encouraged. It was acknowledged that approval should have been sought prior to the arrangements. Management, the Legal Advisers and Finance were tasked to deal with the response in writing to the Plaintiff.

The Minutes indicate that the Legal Adviser from Corpus Legal Practitioners present by invitation was Charles Mkokweza. It is the Plaintiff's further evidence that the subject of inter-company loans also arose at the 69th Meeting of the 7th Defendant's Board of Directors as evidenced by exhibit "LM2," being a copy of the

Minutes of the said meeting. Again, Charles Mkokweza of Corpus Legal Practitioners was present by invitation.

Messrs. Corpus Legal Practitioners opposed the summons for an order directing it to recuse itself from acting in the matter by filing an affidavit in opposition thereto sworn by one Sydney Chisenga, one of Counsel seised with the conduct of this matter on behalf of the 7th Defendant.

The deponent confirmed that Charles Mkokweza of Messrs. Corpus Legal Practitioners was invited to attend the Board of Directors Meetings held at Radisson Blu Hotel on 5th December, 2013 and 12th December, 2014, respectively, as the external Legal Adviser to the 7th Defendant. It was also put on record that Corpus Legal Practitioners has a retainer agreement with the 7th Defendant by virtue of which the firm provides advisory services to the 7th Defendant on a variety of legal matters as well as legal representation in court action.

It was also put on record that Corpus Legal Practitioners has never acted for any of the shareholders of the 7th Defendant, including the Plaintiff herein, in any legal proceedings relating to or touching on the subject matter of this action. The deponent reiterated that the firm attended the Board Meetings on invitation and that its attendance was sought because it is the Legal Adviser to the 7th Defendant.

The deponent further deposed that the Plaintiff in its application had failed to show how Corpus Legal Practitioners is conflicted by representing the 7th Defendant in this action.

It was the deponent's contention that the Plaintiff had failed to show how Corpus Legal Practitioners may be biased, have no independence or may act to the detriment of the Plaintiff who is not its client. That the assertion that there is a conflict of interest is a fiction calculated to derail these proceedings.

At the hearing Mr. Mutale, SC., appearing for the Plaintiff gave *viva voce* submissions in which he stated that the Plaintiff would rely on the Affidavit in Support, List of Authorities and Skeleton Arguments filed in Court by the Plaintiff in support of its application.

He further submitted that the Plaintiff would also rely on the documents filed in support of the application which confirm that there were two Board Meetings of the 7th Defendant, namely, the 65th Board Meeting and the 69th Board Meeting which both confirm that the firm of Corpus Legal Practitioners were in attendance at the said meetings and did render legal advice to the 7th Defendant in relation to the matters that are now the subject of the action before Court.

Mr. Mutale SC., submitted that Corpus Legal Practitioners is a potential witness in the matter and could be subpoenaed by any of the parties to the dispute. State Counsel Mutale submitted in addition, that the situation in which the said firm finds itself in this matter is clearly captured by Rule 33 (1) (d) and (e) of the Legal Practitioners Practice Rules. According to Mr. Mutale, the Plaintiff's interpretation of these rules is that Corpus Legal Practitioners are clearly precluded from participating in these proceedings. That

the firm should have, at its own instance, not accepted instructions in the matter as it is likely to be a witness.

Regarding the issue of the Plaintiff not demonstrating how Corpus Legal Practitioners is conflicted by representing the 7th Defendant in this action, Mr. Mutale submitted that, that is not the issue in contention; the application being anchored on rule 33 of the Legal Practitioners Practice Rules. That the Plaintiff having demonstrated that Messrs Corpus Legal Practitioners attended the two Board Meetings of the 7th Defendant at which the issue discussed is the subject of the present proceedings, that confirms the fact that the law firm is a potential witness in this case.

In rebuttal, Mr. Chisenga submitted that they opposed the application and in so doing, would rely on the Affidavit in Opposition and Skeleton Arguments filed in Court on 29th May, 2017. He further submitted that the Plaintiff had failed to demonstrate how the presence of his partner Mr. Mkokweza at the two Board Meetings raised the issue of conflict of interest. Counsel submitted in addition, that from the Affidavit in Opposition, they had clearly demonstrated that the presence of Mr. Mkokweza at the meetings was to provide advisory services to the 7th Defendant, a fact affirmed by Mr. Mutale, when he submitted that the firm had rendered advice to the 7th Defendant at these Board Meetings. It was Counsel's contention that any advice rendered to the 7th Defendant at that meeting had the protection of legal professional privilege and therefore the firm is not compellable as a witness in these proceedings.

Mr. Chisenga submitted further, that Corpus Legal Practitioners has never acted for the Plaintiff for it to have information that would be adverse to the Plaintiff. He cited the case of *Law Association of Zambia v. Attorney General and Phillis Lombe Chibesakunda*¹, a High Court judgment which relied on several English authorities which were cited in the judgment. The tests as to whether a conflict of interest would arise in these proceedings, as decided in the case, would be firstly, if the Plaintiff was a former client of Corpus Legal Practitioners, but in this case the Plaintiff was never at any point, a client of Corpus Legal Practitioners. Secondly, if Corpus Legal Practitioners possesses confidential information of the Plaintiff as a former client and lastly, if Corpus Legal Practitioners possesses information which is relevant to the matter on which the firm could be instructed upon by another client. Learned Counsel contended that these circumstances do not exist in this matter and for emphasis, submitted that any advice that Corpus Legal Practitioners could have rendered to the 7th Defendant is captured by the legal practitioners' professional privilege. It is therefore, not correct according to Counsel, to state that the firm is a potential witness.

With regard to the Plaintiff's reference to Rule 33 (1) (d) and (e) of the Legal Practitioners Practice Rules, Mr. Chisenga submitted that clause (d) as cited, refers to a situation where there is no involvement of legal professional privilege, which was not the case with Corpus Legal Practitioners when they appeared at the said Board Meetings. Counsel submitted further, that paragraph 8 of the affidavit in opposition to the summons for this application which states that Messrs. Corpus Legal Practitioners have a retainer

with the 7th Defendant as their legal counsel has not been rebutted and technically, that is an acceptance that a solicitor/client relationship exists between Corpus Legal Practitioners and the 7th Defendant which relationship is governed by the well-established rules of legal professional privilege.

It was Mr. Chisenga's further contention that Rule 33 (1) (e) which the Plaintiff cited refers to a situation where the practitioner has been responsible for deciding on a course of action and the legality of that action is in dispute in the proceedings. Counsel contended that Corpus Legal Practitioners as a firm is not a director or shareholder in the Plaintiff company for them to decide on a course of action. Therefore, rule 33 (1) (d) and (e) is not applicable in this case.

On the strength of these submissions, it was learned Counsel's prayer on behalf of his firm and the 7th Defendant whom they represent, that the application lacks merit and should be dismissed with costs to the 7th Defendant who is nominal defendant in these proceedings.

In supplementing his co-Counsel's submissions, Mr. Kawana put it on record that they were not served with the Summons for Order Directing Messrs. Corpus Legal Practitioners to Recuse Themselves from Acting in Matter but were only served with the Affidavit in Support as well as Skeleton Arguments in support of the application. Counsel lamented that as such, they did not have the benefit of fully appreciating the law pursuant to which the application is before this Court.

It was Counsel's contention that summons for any application that is filed before Court ought to be served on, at the very least, all the parties that are entitled to respond. It was his further contention that without the benefit of having had sight of the summons, they had been deprived of the opportunity to adequately respond to the application. In that regard learned Counsel referred this Court to the case of *Bellamano v. Ligure Lombarda Limited*², where the Supreme Court emphasised that the law pursuant to which an application is brought ought to be indicated on the summons. It was Counsel's further submission that in line with that case, this Court in the case of *Josiah Tembo and Another v. Peter Mukuka Chitambala*³, held that it is necessary to indicate the Order pursuant to which an application is made on the summons. Counsel contended that the mere fact that they did not see the law pursuant to which this application was brought, made them wonder whether the application itself was competently before this Court.

In reply to the submissions by Messrs. Chisenga and Kawana, Mr. Mutale, SC., submitted that the stance taken by Mr. Kawana in his submissions seemed to contradict the submissions by his colleague, Mr. Chisenga, who made reference to the Plaintiff's Skeleton Arguments. In State Counsel's view, this clearly was confirmation that the firm Corpus Legal Practitioners was not prejudiced in any way by the lack of service of the summons as they were aware of the issues they were responding to. It was, however, State Counsel's submission that what he had submitted notwithstanding, the record would confirm that a summons was filed together with the affidavit in support but that the reason why

the summons were not served on the other parties was because the Registry had not served them with copies of the same.

Dr. Mulwila SC., co-Counsel for the Plaintiff, also made some submissions in reply. He submitted that it is noteworthy that Messrs. Corpus Legal Practitioners have not disputed that they attended the two Board Meetings where issues pertaining to the dispute before this Court were raised. He pointed out that the firm had further admitted that they rendered legal advice in the two meetings.

Dr. Mulwila drew this Court's attention to rule 33 (1) (d) and (e) of the Legal Practitioners Practice Rules which stipulates as follows: -

"33 (1) A practitioner shall not accept any brief if to do so would cause the practitioner to be professionally embarrassed under the following circumstances-

(a) ...

(b) ...

(c) ...

(d) The matter is one in which the practitioner has reason to believe that the practitioner is likely to be a witness or in which whether by reason of any connection of the practitioner (or of any partner or other associate of the practitioner) with the client or with the Court or a member of it or otherwise, it will be difficult for the practitioner to maintain professional independence or the administration of justice might appear to be prejudiced;

(e) The practitioner has been responsible for deciding on a course of action and the legality of that action is in dispute in the proceeding."

According to Dr. Mulwila, Messrs. Corpus Legal Practitioners rendered legal advice in the two meetings they attended. For that

reason, it is difficult for them to maintain professional independence in this Court since they had formed their opinion which they rendered to their client and cannot, therefore, be expected to depart from that opinion and be independent in these proceedings. In State Counsel's view, that fact in itself is sufficient ground for recusal. Regarding the requirement that a practitioner should not accept a brief if he/she is likely to be a potential witness, Dr. Mulwila submitted that the rule talks of a potential witness and not legal professional privilege. It was Dr. Mulwila's understanding that the scope of the firm becoming a witness is quite wide. Thus they could be called upon to give evidence on what transpired at the meeting and that cannot be privileged.

Supplementing his co-Counsels' submissions, Mr. Lungu submitted in answer to Mr. Kawana's contention that they were not served with the Summons for an Order Directing Messrs. Corpus Legal Practitioners to Recuse themselves from Acting in the Matter, that the arguments on the merit of the application by Mr. Chisenga supplanted or waived the complaint of lack of service because Mr. Chisenga addressed his mind to the legal provisions that are relevant in this application. Moving on to the submission by Mr. Chisenga that they are not compellable as a witness on account of a blanket legal professional privilege, Mr. Lungu argued that to the contrary, legal professional privilege has a specific scope, and only attaches to communications that are confidential. He contended that if documents or communications which would otherwise be privileged contain information which is already in the public domain or which has been shared with third parties, then the legal professional privilege is lost. Learned Counsel submitted that in

this case, the 7th Defendant shared Minutes of the Board Meetings. Thus the Minutes which contained the legal advice that Corpus Legal Practitioners gave to the 7th Defendant are now in the public domain and are, therefore, not confidential. According to Counsel, this entailed, and it was their submission, that any privilege they had, if at all, was now lost.

I have perused the affidavit in support of as well as that in opposition to the application before me. I have also considered the List of Authorities and Skeleton Arguments filed by both sides in support of their respective cases. I have further, considered the *viva voce* submissions by both learned Counsel for the Plaintiff and learned counsel for the 7th Defendant. It is common cause that Messrs. Corpus Legal Practitioners, the 7th Defendant's advocates on record did, by invitation, attend the 65th and 69th Board Meetings of the 7th Defendant as legal advisers. It is also common cause that the subject of inter-company loans arose at the two Board Meetings where Mr. Charles Mkokweza of Messrs. Corpus Legal Practitioners represented the firm and gave the firm's legal opinion on the subject under discussion.

It has not been disputed that Corpus Legal Practitioners is on a retainer with the 7th Defendant to provide advisory services on a variety of legal matters as well as legal representation in court.

The issue to be considered by this Court when determining this application is, in my view, whether Messrs. Corpus Legal Practitioners contravened the provisions of Rule 33 (1) (d) and (e) of the Legal Practitioners Rules, Statutory Instrument No. 51 of

2002 by accepting the brief to act for the 7th Defendant in this matter.

It is correct, as submitted by the Plaintiff, that the High Court has supervisory jurisdiction over legal practitioners pursuant to section 85 of the Legal Practitioners Act and indeed has the power to prevent a practitioner prohibited by rules of professional conduct from acting or continuing to act in a matter before the Court. Section 85 of the Legal Practitioners Act provides that: -

"Any person duly admitted as a practitioner shall be an officer of the court and shall be subject to the jurisdiction thereof."

For ease of reference, I will reproduce the provisions of Rule 33 (1) (d) and (e) of the Legal Practitioners Practice Rules, 2002.

The Rule provides as follows: -

"33 (1) A practitioner shall not accept any brief if to do so would cause the practitioner to be professionally embarrassed under the following circumstances -

(a) ...

(b) ...

(c) ...

(d) The matter is one in which the practitioner has reason to believe that the practitioner is likely to be a witness or in which whether by reason of any connection of the practitioner (or of any partner or other associate of the practitioner) with the client or with the Court or a member of it or otherwise, it will be difficult for the practitioner to maintain professional independence or the administration of justice might appear to be prejudiced;

(e) The practitioner has been responsible for deciding on a course of action and the legality of that action is in dispute in the proceeding,
(underlining the Court's for emphasis only).

After reviewing the Minutes of the two Board Meetings which were attended by Messrs. Corpus Legal Practitioners by invitation as the 7th Defendant's legal advisers, I am of the view that the firm was not professionally embarrassed by accepting the brief from the 7th Defendant because as legal adviser it had no reason to believe that it was likely to be a witness in the matter before Court for giving legal advice to its client.

The Plaintiff submitted that Corpus Legal Practitioners is a potential witness which could be subpoenaed by any of the parties to the dispute to give evidence on what transpired at the meetings. Technically there is nothing to stop the parties to these proceedings from issuing a subpoena to compel Corpus Legal Practitioners from giving evidence on what transpired at the two meetings because the firm was in attendance. However, they did not attend the meetings as participants in the deliberations but as legal advisers. I do not see the benefit of compelling a legal adviser to testify on what transpired at the meeting when the decision makers can be subpoenaed, if necessary, to testify.

It is Corpus Legal Practitioners' argument that the relationship that exists between the 7th Defendant and itself is that of solicitor/client and is governed by well-established rules of legal professional privilege. That for that reason, the firm is not compellable as a witness in these proceedings. Mr. Lungu, learned Counsel for the Plaintiff, countered this argument by submitting that legal

professional privilege attaches to confidential communication between advocate and client and that since the Minutes of the two meetings which Corpus Legal Practitioners attended are now in the public domain, they are no longer confidential and any privilege that existed, if any, is now lost. I concur with the submission by Mr. Lungu that legal professional privilege attaches to confidential communication between advocate and client and that since the Minutes of the two meetings are now in the public domain, they are no longer confidential and the firm cannot claim any privilege in relation to the said Minutes.

It was the Plaintiff's submission that Messrs. Corpus Legal Practitioners formed their opinion which they rendered to their client and therefore, cannot be expected to depart from that opinion and be independent in these proceedings. Contrary to the Plaintiff's submission on the difficulty that Corpus Legal Practitioners could face in maintaining professional independence in this Court, if my understanding of professional independence is correct, which is, the ability of a professional not to be influenced, coerced or pressured by any external factors in the performance of his/her duties, I do not envision how rendering of legal advice by the firm to the 7th Defendant in the two Board Meetings would make it difficult for them to maintain professional independence in this Court.

In my opinion, in all probability, all counsel representing the parties to this action have already formed their own opinions on the case before this Court which they may or may have not

communicated to their clients, however, I do not expect that fact to affect their professional independence before this Court.

According to Rule 33 (1) (e) of the Legal Practitioners Practice Rules, the other instance when acceptance of a brief would cause a practitioner to be professionally embarrassed is when the practitioner has been responsible for deciding on a course of action and the legality of that action is in dispute in the proceeding. The provisions of Rule 33 (1) (e) are unambiguous. Sub-rule (1) (e) of the Rule 33 refers to a situation where the practitioner has been responsible for deciding on a course of action whose legality is in dispute in the proceeding.

I concur with Corpus Legal Practitioners' argument that the circumstances which led to the Plaintiff's action herein had already occurred by the date of the Board Meetings. Indeed, a perusal of the Minutes reveals that the transactions in issue had taken place long before the 65th and 69th Board Meetings.

Therefore, Corpus Legal Practitioners is correct in submitting that it cannot be said to have been responsible for deciding on the course of action whose legality is in dispute in this action.

Given the circumstances highlighted above, I am satisfied that the provisions of Rule 33 (1) (d) and (e) are not applicable in this case.

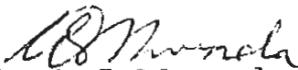
Regarding Mr. Kawana's complaint of lack of service of the Summons by the Plaintiff, I concur that, that is a non - issue because by arguing on the merits of the application, his co-Counsel waived the complaint as he clearly addressed his mind to the legal provisions relevant to the application.

For the aforesaid reasons, the application for an order directing Messrs. Corpus Legal Practitioners to recuse themselves from acting in the matter is denied for want of merit.

Costs are awarded to the 7th Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 15th day of June, 2017.


Winnie S. Mwenda (Dr)
HIGH COURT JUDGE