IN THE HIGH COURT FOR ZAMBIA **2009/HP/0824**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

GREEN MWANZA **PLAINTIFF**

AND

THE ATTORNEY GENERAL **DEFENDANT**

BEFORE HONOURABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: *Mr. Green Mwanza (In person)*
For the Defendant: *Mr. C. Mulonda – State Advocate*

R U L I N G

Cases referred to:

1. *Admark Zambia Limited v. Zambia Revenue Authority*
2. *Damailes Mwanza v. Ndola Lime Company Limited (2012) 3 ZR 268*
3. *Annard Chibuye v. Zambia Airways Corporation Ltd (1985) ZR 4 (SC) (2006) ZR 43*
4. *Sun Country Limited v. Charles Kearney; selected Judgment No. 20 of 2017, SCZ/8/265/2016, Appeal No. 7/2017*
5. *Khalid Mohamed v. The Attorney General (1982) ZR 49*

Legislation referred to:

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

This is a notice of motion to raise preliminary issue pursuant to *Order 14A Rule and Order 33 Rule 3 of the Supreme Court Rules*[1] to determine the issue

(i) Whether the Court can be referred to the result of a criminal trial as proof of the fact which must be established in civil suit.

The notice was supported by skeleton head of arguments. It was submitted that the Plaintiff's claims were

(i) Compensation of K650, 000, 000 (now K650, 000);
(ii) Damages for unlawful detention and malicious prosecution;
(iii) Loss of business
(iv) General exemplary damages;
(v) Any other relief the Court may deem fit;
(vi) Costs.

That the basis of these claims according to the Plaintiff was that the Plaintiff was a debt collector who was engaged by his prospective clients to verify a debt claim at ***Lafarge Cement Zambia Plc*** and that he visited the said company on 30th October, 2006.

It was the Plaintiffs position that the management of the company accused him of forgery, uttering false documents and attempting to obtain money by false pretences and subsequently reported to the

drug Enforcement Commission (DEC). The DEC accordingly arrested the Plaintiff charged him and prosecuted him in the Court but he was subsequently acquitted on 3rd October, 2007. Suffice to mention that the co-accused of the Plaintiff was convicted of the charged offences.

Under ground 1 it was argued that the Defendant was at liberty to raise an issue on a point of law at any stage of the proceedings, pursuant to *Order 14A Rule 1 (1) of the Supreme Court Rules of England*[1].

Further reliance was placed on *Order 33 Rule 3 of the Supreme Court Rules of England* [1] for the proposition that the Court "may Order any question or issue arising in a cause or matter, whether of fact or law or partly of law, and whether raised in the pleadings or otherwise, to be tried before at or after trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated".

Further reliance was placed on the Supreme Court case of ***Admark Limited v. Zambia Revenue Authority***[1] where it was held that:-

> *"A party may at the trial raise a point of law even though it was not pleaded in his defence"*

It was submitted that on the foregoing authorities, the Defendant was entitled to raise a preliminary issue on a point of law even if the same was not pleaded.

I will deal summarily with this ground.

It is trite law that a point of law can be launched at anytime of the proceedings even after the proceedings. The case of ***Admark Limited v. Zambia Revenue Authority***[1] cited by the Learned Mulonda is indeed one such case in point. Dr. Matibini SCJ, (as he then was) had occasion to pronounce himself on the subject matter in the case of ***Damailes Mwanza v. Ndola Lime Company Limited***[2]. He put it this way:-

> "***Holding number 5*** *It is convenient to raise a preliminary point of law in pleadings to ensure that issues in dispute are defined at the earliest opportunity and might even have the effect of avoiding a trial.*
>
> "***Holding 6*** *Notwithstanding a party may at the trial raise a point of law open to him even though it was not pleaded in his defence*"

There is therefore no need for any further investigations to determine whether a party to the proceedings can launch a preliminary issue at any stage of the proceedings.

Ground 2 it was submitted that the Court cannot be referred to the result of a criminal trial as proof a fact which must be established in a civil suit.

In support of the above legal proposition, learned Counsel placed reliance on the case of ***Annard Chibuye v. Zambia Airways***

Corporation Ltd[3]. In conclusion, the Defendant invited the Court the Plaintiffs action as misconceived with costs.

Turning to the Plaintiffs affidavit which opposed the Defendants application, it was Counsels submission that paragraph 8 of the said affidavit contains prayer and as such offends *Order 5 Rule 15 of the High Court Rules*[1].

At the hearing Counsel more or less echoed the essence of the skeleton arguments whilst the Plaintiff re-echoed his affidavit and additionally sought leave to amend the affidavit in opposition in limine and also to engage Counsel.

Learned Counsel opposed the applications pointing out that this matter has been raging on since 2009 and the Defendant had all the time to engage Counsel.

That it was in the interest of justice that this matter was expediently brought to a close. It was pointed out that in the event that the Court was inclined to allow the Defendant to engage Counsel, then he must be condemned in costs.

I will deal with the preliminary issues relating to defective affidavit and application to engage Counsel.

In respect of Learned Counsel's submission that paragraph 8 offends Order 5 Rule 15 of the High Court and that the paragraph should be expunged or indeed the entire affidavit, I only need to refer to the Judgment of the Court of final resort in the case of ***Sun Country Limited v. Charles Kearney and another***[4], where his

Lordship Malila J, SC as he then was had occasion to pronounce himself on the subject at pages J20 to J25. He put it this way:-

> *"It is clear to us that the requirements under Order 5 Rule 20 of the High Court Rules and Section 6 of the Commissioner for Oaths Act are in respect of the form of the document as opposed to the substance. In our understanding, Section 47 of the Interpretation and General Provisions Act, Chapter 2 of the Las of Zambia shed some light on the practical consequences of defects in form on one hand and in substance on the other.*
>
> *The section provides as follows:-*
>
> > *'Save as expressly provided, whenever any form is prescribed by any written law, an instrument or document which purports to be in such form shall not be void by reason of any deviation there from which does not affect the subsistence of such instrument or which is not calculated to mislead'*

The import of the above section is that if the defect in an instrument or document is in form, it is not a fundamental defect or irregularity and is thus curable. An affidavit afflicted by such a defect is receivable under Order 5 Rule 13 of the High Court Rules which Counsel for the Appellant quoted. The rule authorises Courts to receive affidavits despite irregularities in form. It states as follows:-

"The Court or a Judge may permit an affidavit to be used notwithstanding it is defective in form according to the Rules, if the Court or Judge is satisfied that it has been sworn before a person duly authorised"

In the present case, there was no issue raised regarding the authority of the Commissioner of oaths before which the affidavits which the lower Court deemed to have fallen foul of the law were sworn.

To further confirm that an affidavit which is defective in form only is not a minefield for a party desiring to rely on it, Order 5 Rule 14 of the High Court Rules provides that:-

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

Order 41 Rule 4 of the Rules of the Supreme Court (White Book) 1999 Edition states that:-

> *"An affidavit may with the leave of the Court be filed or used in evidence notwithstanding any irregularity in the form thereof"*

The explanatory notes in the White Book on the effect of that rule reads

> *"This rule is permissive. If the irregularity can be cured without undue hardship, or it is not a matter of substance*

or affects its actual content, then it should be put right. Any costs will fall on the solicitor responsible"

Taking the arguments further, and for good measure, the contention against expunging the affidavits premised on Order 5 Rule 13 appears to contravene a statutory provision in the name of Section 5 of the Commissioner for Oaths Act, the High Court Rules which are subsidiary legislation, have to give way to a principal provision of a statute. That in our view would be a decent argument. However, even if Order 13 were to be discounted from application, Section 47 of the Interpretation and General Provisions Act which we have quoted would still be sufficient to save the affidavit in question"

On the basis of the above instructive and authoritative pronouncements, I hold that the affidavit in opposition is receivable despite the alleged irregularity.

In respect of an application to engage Counsel, it is trite that a litigant is at liberty at any stage to engage Counsel of his own choice at his cost. This right cannot be denied to the Plaintiff though he has elected to employ it late.

I will therefore grant the Plaintiff liberty to appoint his desired Counsel. I do not think that the delay should be visited with sanctions of costs since the Plaintiff is merely exercising his right.

In respect of the substantive application that the proceedings should be terminated on account of the fact that the Plaintiff

predicates is claims on the acquittal following a criminal prosecution and resultant claims.

I am of the considered view that it will be premature at this stage to torpedo the Plaintiffs claim that he will rely on the acquittal to secure a favorable Judgment whereas it is trite law that criminal trial cannot be basis to establish a civil suit as demonstrated in the case of ***Annard Chibuye v. Zambia Airways Corporation Ltd***[3], where the apex Court observed:-

> *"Following Kabwe Transport Ltd v. press Transport [1975] Ltd (1984) ZR 43, the result of a criminal trial cannot be referred to as proof of fact which must be established in a civil Court, and this applies whether the criminal trial resulted in a conviction or in an acquitted"*

As I see it, the issue is that of burden of proof which can only be navigated and interrogated at trial not at pleading level. The Plaintiff has stated his case in the Writ and Statement of Claim based on the facts as narrated by him. It is trite that a party pleads facts and not the evidence.

In respect of the burden of proof, Ngulube DCJ, as he then was, had occasion to pronounce himself on the subject matter in the case of ***Khalid Mohamed v. The Attorney General***[4], at page 51, he put it this way:-

> *"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is*

unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponents defence does not entitle him to Judgment. I would not accept a proposition that even if a Plaintiffs case has collapsed of its inanition or for some reason or other, Judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly, a Defendant in such circumstances would not even need a defence"

As alluded earlier in the immediate preceding paragraph, the issue at hand is that of standard and burden of proof. Proof of one's case depends on the facts and the evidence presented partly in pleadings and also at trial. It involves determination of admissibility of evidence, assessment and evaluation of evidence, determination of issues of credibility and application of the law to the proven facts at hand.

Those issues cannot be dealt with before trial. Dismissing the Plaintiffs action at this stage will amount to abrogating one of cornerstone rules of natural justice in our jurisdiction expressed in the Latin maxim "*audi alterem partem*" simply put, *"hear the other party".*

In conclusion and on the aforesaid analysis of the application, I have reached an untroubled conclusion that the Defendants application to terminate the Plaintiffs action at this stage is destitute of merit.

It is dismissed with costs to be taxed in default of agreement.

Delivered under my hand and seal this ..19th.. Day of June, 2017

Mwila Chitabo, SC
Judge