

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2016/HPC/0489

(Civil Jurisdiction)

BETWEEN:

LUSAKA HARDWARE LIMITED



PLAINTIFF

AND

DULUX ZAMBIA (2005) LIMITED

DEFENDANT

RULING

Legislation Referred to:

- 1. Order XXXIX, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*
- 2. Order 14., rule 5 (2), High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*
- 3. Order 14., rule 5 (3), High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*
- 4. Order 14, rule 5(1) of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia*

This is the Plaintiff's application for Review of the Court's Order of 21st March, 2017. The Order in issue struck out the Plaintiff, as a party, for misjoinder.

The application was made pursuant to **Order XXXIX of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia**. In support of the application, the Plaintiff filed an Affidavit in Support and Skeleton Arguments on 4th April, 2017.

The brief background leading up to the application is that the Plaintiff instituted proceedings against the Defendant by dint of a Writ of Summons taken out on 7th October, 2016. The Plaintiff's claim was for:

- a) Payment of rent arrears in the sum of US\$38, 533.92;
- b) interest;
- c) Costs of and occasioned by the proceedings.

Service of the Writ attracted the filing of a Conditional Memorandum of Appearance, by the Defendant, on 20th October, 2016.

In pursuance of the Conditional Appearance, the Defendant filed an application to strike out the Plaintiff for misjoinder of party in line with **Order 14., rule 5 (2) of the High Court Rules**.

The Defendant's application was scheduled for hearing on 10th February, 2017. The application was founded on the contention that the Plaintiff was not a party to the lease under which the Plaintiff sought to derive the claimed rentals. The lease, exhibit "**MS1**" of the Affidavit in Support revealed that the parties to the said lease agreement were one Ramesh Patel and the Defendant.

When the matter was called for hearing on 10th February, 2017 both parties were represented. The Plaintiff was represented by Mr. Museba of Messrs Simeza, Sangwa & Associates and the Defendant by Messrs Tembo, Ngulube & Associates. At the said hearing, Counsel for the Plaintiff informed the Court that the Parties had agreed to enter into a consent order whose effect would be to withdraw the application for misjoinder and to allow for the joinder of a party. The Plaintiff, therefore, applied for an adjournment to enable them to, in his words, "**file the said orders and make the relevant amendments to the pleadings.**"

The Court expressed concern over the inordinate delay occasioning the disposal of the application for misjoinder, which it observed was not contested. In view of its observation and concern, the Court allowed the adjournment as an instrument to facilitate the uncontested application and attached a timeframe within which the consent order ought to have been filed, failure to which the Plaintiff would be struck out for misjoinder of a party, effective Tuesday 14th February, 2017.

By March, 2017 the parties had not filed the consent order that they undertook to file. In consonance with the condition attached to the grant of the adjournment on 10th February, 2017, the Court struck out the Plaintiff as a party for misjoinder. This was achieved by Order Striking Out a Party for Misjoinder dated 21st March, 2017. It is this Order that forms the subject matter of the Plaintiff's application to review and to quash.

The Affidavit in Support of the Plaintiff's application was sworn by John Sangwa (SC), who confirmed the intention of the parties to file the Consent Order that Mr Museba had undertaken to file. However, it was deposed that the parties failed to file the order within the deadline given by the Court because Counsel for the Defendant reneged on his undertaking to execute the consent order.

The Plaintiff presented several arguments which I have considered, albeit I will not thoroughly delve into. My position is premised on the consideration that the application turns on the fundamental argument that the Order striking out the Plaintiff has given rise to an absurdity where the matter is now without a Plaintiff, which in turn amounts to the determination of the entire cause without a hearing on the merits.

The application lured opposition from the Defendant by medium of an Affidavit in Opposition and List of Authorities of 31st August, 2017. No skeleton arguments were filed.

The Affidavit in Opposition is at odds with the Affidavit in Support to the extent that the deponent attributes the failure by the parties to file the Consent Order in time to the Plaintiff. It was deposed that the Plaintiff did not draft the Consent Order in the manner agreed by the parties, hence the Defendant's refusal to execute it.

When the matter came up for hearing, the Defendant addressed the Plaintiff's contention that an absurdity was created by submitting that according to the rules of Court, an order for misjoinder does not defeat the cause of action.

I have carefully considered all the affidavit evidence, authorities and arguments on record and maintain that the application hinges on whether the Order has created an absurdity.

I recognise that in answering the question whether or not the Order birthed an absurdity, it is necessary to acknowledge that under **Order XIV., sub rule 3 of rule 5 of the High Court Rules** it is clear that "**No suit shall be defeated by reason of non-joinder or misjoinder of parties**".

Given the nuance of Order XIV, rule 5 (3), I question whether an Order for misjoinder of a plaintiff, without an attendant order for the joinder of a another party as a plaintiff, is sustainable in circumstances where there are no other plaintiffs in the cause. I have no qualm in finding that an order for misjoinder in the

absence of an attendant order for joinder in such circumstances exposes the suit to being defeated on account of the order of misjoinder.

In view of the foregoing, not only does the Order of 21st March, 2017 fly in the face of Order XIV, rule 5 (3), I agree that a degree of illogicality befalls that Order of misjoinder. That being the case, I am of the settled view that the circumstances *in casu* constitute sufficient ground for me to exercise my discretion under Order XXXIX of the High Court Rules to review the Order.

As I consider the nature of review, I am sentient of the provisions of **Order 14, rule 5(1) of the High Court Rules**, which vests, in this Court, the power to, *suomoto*, ensure that a party who has an interest in the subject-matter of the suit, or who may be likely to be affected by the result, be joined as a party.

I am of the firm view that there is a likelihood that Mr Ramesh Patel, expressed as the Landlord in the exhibited Lease Agreement has an interest in this cause.

In light of the above, the Order of 21st March, 2017 is varied by the inclusion of an attendant order of the non-joinder of a party. To that effect, it is hereby directed that Mr. Ramesh Patel be and is hereby joined to these proceedings as a Plaintiff.

I would end here, were it not for what I suspect to be anticipated consequential amendments that the Order for joinder is likely to provoke. And so, for the sake of expediency, I also give leave to the Plaintiff to amend pleadings within 14 days of the date of this Ruling.

Each party shall bear its own costs.

Leave to appeal is granted

Dated this 22nd Day of January, 2018



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Judge B. G. Lungu
High Court