

IN THE HIGH COURT FOR ZAMBIA

2017/HPC/0295

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

FIRST CAPITAL BANK ZAMBIA LIMITED

PLAINTIFF

ZDENAKIE COMMODITIES LIMITED

INTENDED 2ND
PLAINTIFF

AND

ZAMBIA CO-OPERATIVE FEDERATION
LIMITED

DEFENDANT

Before the Hon. Madam Justice Irene Zeko Mbewe

For the Plaintiff : *Mr. M. Sikaulu of Messrs SLN Legal Practitioners*

For the Intended 2nd Plaintiff : *Mr. M Mwanashiku of Messrs M and M Advocates*

For the Defendant : *Ms S Kaingu of Messrs Chibesakunda and Company*

R U L I N G

Cases Referred To:

1. *Attorney-General v Tall & Another (1995-1997) ZR 54*
2. *Abel Mulenga and Others v Mabvuto Adam Avuta Chikumbi and Others v Attorney General [2006] ZR 33*
3. *Lummus Agriculture Services Company Ltd and Others v Gwembe Valley Development [1999] ZR 1*
4. *Aruj Rathi Krishman v The People HPA/ 11/2010 unreported*
5. *Grindlays Bank Limited v Vallabhji and Others [1966] 2 ALL E R 626*

Legislation and Other Works Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Authentication of Documents Act Cap 75 of the Laws of Zambia*
3. *Bryan A Garner 'Black's Law Dictionary', 5th Edition, Thomson Reuters*

This is the intended 2nd Plaintiff's application for joinder filed into Court on 24th November 2017. The supporting affidavit is deposed to by George Liacopolilos, the Managing Director in the intended 2nd Plaintiff. The salient facts are that Transglobe Produce and Export Limited by a Specific Power of Attorney dated 23rd November 2017 authorised the intended 2nd Plaintiff to commence legal proceedings

on its behalf (Exhibit "GL1"). That by an agreement dated 9th December 2016, the intended 2nd Plaintiff agreed to supply the Defendant with 50,000 metric tonnes of white maize to fulfil a contract that it had to supply maize to ADMARC in the Republic of Malawi (Exhibit "GL2"). That in Clause 3 of the said Agreement, it stipulated that as soon as ADMARC paid for the maize supplied by the intended 2nd Plaintiff to the Defendant, payment would be made to the intended 2nd Plaintiff. It is deposed that the Defendant is indebted to the intended 2nd Plaintiff in the sum of US\$607,739.24 (Exhibit "GL3"). That the intended 2nd Plaintiff has established that it has a justifiable cause of action against the Defendant and has sufficient interest in the funds which have been paid by ADMARC to the Defendant as it was due to be paid from the said funds.

The application was opposed by way of affidavit deposed to by Ephraim Katwamba Chinduna the Credit Manager in the Plaintiff Bank. It is deposed that the Specific Power of Attorney signed in Limbe, Malawi is not authenticated. Further that the Agreement dated 9th December 2016 does not provide that the maize was to fulfil a contract for the supply of maize to ADMARC in the Republic

of Malawi or provide any contractual obligation by way of assignment or otherwise, in relation to any payments received by the Defendant from ADMARC. That paragraph 10 of the Agreement provides an arbitration and mediation clause for settlement of disputes. According to the Plaintiff, there is no common cause of action warranting or justifying joinder of the intended 2nd Plaintiff to this action. That the Plaintiff's action is in respect of a banking facility furnished to the Defendant in which matter the intended 2nd Plaintiff has no interest whatsoever.

In the intended 2nd Plaintiff skeleton arguments, Counsel relied on *Order 14 Rule 5 (1) High Court Rules, Cap 27 of the Laws of Zambia*. Reliance was placed on the case of **Attorney-General v Tall and Zambia Airways Corporation Limited [1995-1997] ZR 54¹** in support of the proposition on joinder.

In the Plaintiff's skeleton arguments filed into Court on 5th December 2017, reliance on the case of **Abel Mulenga and Others v Mabvuto Adam Avuta Chikumbi and Others v Attorney-General [2006] ZR 33²** wherein in an application for joinder, an

Applicant has to show that they have an interest in the subject matter of the action. Counsel for the Plaintiff contends that the intended 2nd Plaintiff argues that it has a common interest that emanates from the ADMARC funds but has not demonstrated a specific interest in the funds by way of Assignment of Receivables but has only demonstrated a debt.

At the hearing, Counsel for the intended 2nd Plaintiff relied on the affidavit, skeleton arguments and list of authorities. In the oral submissions, in respect to the authentication of the Power of Attorney, Counsel contends that it has not misconstrued the Power of Attorney as the said document does not indicate that it was executed in Malawi but merely states the address of the Company as being in Malawi. Counsel argues that at this stage of the proceedings, the Court is not expected to scrutinise the details of the documents. Counsel argues that the non authentication is not fatal to the application as it can be cured. Counsel submits that the intended 2nd Plaintiff has an interest as evidenced by paragraphs 3, 6 and 7 of the Plaintiff's Statement of Claim. Further that the intended 2nd Plaintiff has produced a contract in which it

has supplied names to the Defendant, and that the Plaintiff refers to a Letter of Credit and Charge over the maize procured by the Defendant. Counsel contends that the subject matter of the action includes the maize procured by the Defendant and that the Plaintiff has attached the proceeds of the maize that the intended 2nd Plaintiff supplied to the Defendant. Counsel argues that there will be a multiplicity of matters if the intended 2nd Plaintiff is not joined to these proceedings.

Counsel for the Defendant did not oppose the intended 2nd Plaintiff's application for joinder and argues that the intended 2nd Plaintiff has an interest in the matter and its presence would assist the Court deal with the matter conclusively. Counsel argues that in the opposing affidavit for the summons for a mareva injunction filed on 24th November 2017, the Defendant did place on record that it had subcontracted amongst others the intended 2nd Plaintiff to supply maize to ADMARC in Malawi. Therefore that it would be in the interest of justice that all parties be heard before one Court.

In response, Counsel for the Plaintiff relied on the affidavit, skeleton arguments filed into Court on 5th December 2017. In terms of the authentication, Counsel argues that the intended 2nd Plaintiff has not denied that the document was signed in Malawi and relied on the case of **Lumus Agriculture Services Limited v Gwembe Valley Development [1999] ZR 1³**. Counsel for the Plaintiff concedes that the Specific Power of Attorney as between the parties that executed it is a lawful document and therefore the intended 2nd Plaintiff is lawfully appointed. In respect to joinder, Counsel for the Plaintiff argues that the causes of action are different as the Plaintiff's case relates to a debt under a contract and that the financial instruments used are different contrary to the assertion by the intended 2nd Plaintiff that it relates to the facility given by the Plaintiff. Counsel argues that a Letter of Credit was issued by Standard Chartered Bank of Mauritius and that is where the Plaintiff's interest lies. Further, that the contract between the parties herein does not provide to whom the maize is supplied to, and therefore the intending 2nd Plaintiff cannot have an interest in the receivables in the maize, but only an ordinary debt with the security of the Letter of Credit which they are entitled to enforce.

I have considered the affidavit evidence, skeleton arguments, list of authorities and oral submissions of both Counsels herein. The issue for determination is whether the intended 2nd Plaintiff be joined to these proceedings and whether the Specific Power of Attorney requires authentication.

The intended 2nd Plaintiff's application is made pursuant to *Order 14 Rule 5 (1) High Court Rules, Cap 27 of the Laws of Zambia* which states as follows:

"If it shall appear to the Court or Judge at or before hearing of a suit that all persons entitled to, or claim some share or interest in, the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court or Judge may adjourn the hearing of the suit to a future day, to be fixed by the Court or a Judge, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case, the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such manner as

the Court or a Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause"

The Court therefore has jurisdiction to deal with this matter.

Before I deal with the issue of joinder of parties, a matter of significance needs to be determined from the outset. The issue is where the Specific Power of Attorney was executed and incidental to that, is whether the document should have been authenticated. Counsel for the Plaintiff in its opposing affidavit argues that the Specific Power of Attorney exhibited as "GL1" in the intended 2nd Plaintiff's supporting affidavit is not authenticated as required under the **Authentication of Documents Act, Cap 75 of the Laws of Zambia**. In response, Counsel for the intended 2nd Plaintiff argues that there is no evidence as to where the Specific Power of Attorney was executed and that the onus is on the Plaintiff to prove. Counsel for the intended 2nd Plaintiff further argues that the date stamp on the document merely shows the date and address of the Company and not that it was signed in Limbe, Malawi. As observed

by Counsel for the intended 2nd Plaintiff, I too find that the date stamp shows the address of the intended 2nd Plaintiff as Limbe, Malawi. However, I find that this does not necessarily mean the place where the document was executed. Therefore, did the Specific Power of Attorney require to be authenticated? I find that it did as Counsel for the intended 2nd Plaintiff failed to challenge the evidence that the Specific Power of Attorney was not executed in Limbe, Malawi. In the absence of evidence to the contrary, the correct inference to draw is that the Specific Power of Attorney was not executed in Zambia hence it offends the requirements of the **Authentication of Documents Act, Cap 75 of the Laws of Zambia**. The word 'authentication' is defined in Section 2 of the **Authentication of Documents Act** as follows:

“authentication”, when applied to a document, means the verification of any signature thereon:...

In **Black's Law Dictionary, 5th Edition** by **Bryan A. Garner Thomson Reuters**, it defines the word "authentication" in a similar manner as in the Act as follows:

“The quality, state or condition of being genuine, so that the origin or authorship is reliable as claimed, 2. The quality, state or condition of being true in accordance with the fact.”

Therefore, authentication of document is for purposes of verifying the state of condition of being genuine. Section 3 of the **Authentication of Documents Act, Cap 75 of the Laws of Zambia** provides as follows:

“Any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if –

- (a) In the case of a document executed in Great Britain or Ireland it be duly authenticated by a notary public under his signature and seal of office.*
- (b) In the case of a document executed in any part of Her Britannic Majesty’s dominions outside the United Kingdom it be duly authenticated by the signature and seal of office of the mayor of any town or of a notary public or of the permanent head of any Government Department in any such part of Her Britannic Majesty’s dominions;*
- (c) In the case of document executed in any of Her Britannic*

Majesty's territories or protectorates in Africa it be duly authenticated by the signature and seal of office of any notary, magistrate, permanent head of a Government Department, Resident Commissioner or Assistant Commissioner in or of any such territory or protectorate;

(d) In the case of a document executed in any place outside Her Britannic Majesty's dominions (hereinafter referred to as a "foreign place") it be duly authenticated by the signature and seal of office –

(i) Of a British Consul-General, Consul or Vice-Consul in such foreign place; or

(ii) Of any Secretary of State, Under-Secretary of State, Governor, Colonial Secretary, or of any other person in such foreign place who shall be shown by the certificate of a Consul or Vice-Consul of such foreign place in Zambia to be duly authorized under the law of such foreign place to authenticate such document."

It is apparent that a document executed outside Zambia has to therefore meet the requirements of Section 3 of the **Authentication**

of Documents Act Cap 75 of the Laws of Zambia. Counsel for the Plaintiff argues that in the case of **Lumus Agriculture Services Limited v Gwembe Valley Limited [1999] ZR 1³**, the Court interpreted the meaning and effect of Section 3 as follows:

“It is quite clear from section 3 that if a document executed outside Zambia is authenticated as provided, then it shall be deemed or presumed to be valid for use in this country and if it is not authenticated then the converse is true that it is deemed not to be valid and cannot be used in the country.”

Similarly in the case of **Aruj Kumar Rathi Krishman v The People HPA/11/2010 (unreported)⁴** which I find of persuasive value, the Court in referring to Section 3 of the Act stated as follows:

“This section demonstrates the need for a document executed outside Zambia to be notarised for it to be valid for use in Zambia since the said documents were deposed to outside Zambia they should have been authenticated in accordance with Section 3 of the Authentication of Documents Act for purpose of validating them for use in Zambia. In my view, the

fact that the documents were not so authenticated the trial Court erred at law in admitting the evidence"

I adopt the above legal principles in the cited authorities and the effect is that a document executed outside Zambia, if it is to be valid for use in Zambia, requires to be authenticated in accordance with Section 3 of the **Authentication of Documents Act, Cap 75 of the Laws of Zambia**. Interestingly, Counsel for the intended 2nd Plaintiff after arguing to the contrary on the non authentication of the Specific Power of Attorney, then proceeded to argue that non authentication is not fatal but curable. I opine that Section 3 of the **Authentication of Documents Act, Cap 75 of the Laws of Zambia** is couched in mandatory terms and provides no exceptions under which an unauthenticated document can be admissible in evidence. In any case, a document such as the Specific Power of Attorney can only be authenticated at the time of execution and not after the fact. What this entails is that the Specific Power of Attorney is unauthenticated and cannot therefore be used as evidence in this matter.

Arising from my findings in the preceding paragraph, I am left with no option but to expunge the Specific Power of Attorney exhibited in the intended 2nd Plaintiff's supporting affidavit as evidence. Having expunged the Specific Power of Attorney as evidence, the consequences of this are dire as the intended 2nd Plaintiff cannot bring an action based on the unauthenticated Specific Power of Attorney. Similarly, the intended 2nd Plaintiff's supporting affidavit is expunged from the record as the intended 2nd Plaintiff no longer has legal legs to stand on to support the application for joinder before Court.

Counsel for the Plaintiff argues that the document is enforceable between the parties who executed it but is not binding on third parties such as the Plaintiff herein. I concur with Counsel for the Plaintiff and I am fortified by the case of **Lumus Agriculture Services Limited v Gwembe Valley Limited [1999] ZR 1³** where at page 9 it states as follows:

“We agree with the decision that an instrument which is not attested or registered is valid between the parties but ineffective against other persons...”

Similarly, in the case of **National Grindlays Bank Limited v Vallabhji and Others [1966] 2 ALL E R 626⁵** cited by Counsel for the Plaintiff herein, it was held as follows:

“that an instrument which is not attested or registered is valid between the parties but ineffective against other persons.”

From the authorities and legal principles cited above, it confirms that the Specific Power of Attorney is valid between the two parties, that is Zdenakie Commodities Limited and Transglobe Produce and Export Limited, but it is ineffective against the Plaintiff and Defendant herein.

For reasons stated in the preceding paragraphs, the upshot is that the intended 2nd Plaintiff's application for joinder is dismissed.

Costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this 14th day of March 2018.



.....
HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE